Form No. 7

San Francisco
Law Library

No. 77586

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.

No. 4691

~~1460~~ 1460

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANK GATT and ANGELO MUSTILLO,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILED
OCT 9 1925
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4691

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK GATT and ANGELO MUSTILLO,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Arraignment and Plea.......................... 6
Assignments of Error.......................... 13
Bail Bond Pending Writ of Error............ 18
Bill of Exceptions............................ 22
Certificate of Clerk U. S. District Court to Transcript of Record.................... 40
Citation on Writ of Error................... 44
Information 2
Names and Addresses of Counsel............ 1
Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond........... 15
Order Extending Time to and Including June 30, 1924, For Filing Bill of Exceptions.... 19
Order Extending Time to and Including July 20, 1924, For Filing Record.............. 20
Order Extending Time to and Including September 15, 1924, for Filing Record....... 21
Order Extending Time to and Including October 31, 1924, for Filing Record.......... 21
Order Settling Bill of Exceptions............ 38
Petition for Writ of Error.................. 11

Index. Page

Praecipe for Transcript of Record............ 39
Sentence (Frank Gatt).................... 9
Sentence (Angelo Mustillo)................. 10
Supersedeas Bond......................... 16

TESTIMONY ON BEHALF OF GOVERNMENT:
HARSHBERGER, F. M................ 29
JUSTIE, WALTER M.................. 31
Cross-examination 31
McFARLAND, CHARLES R........... 27
Cross-examination 27
O'HARA, GORDON B................. 23
Cross-examination 26
WHITNEY, W. M..................... 28
Cross-examination 29
Recalled 32

TESTIMONY ON BEHALF OF DEFENDANTS:
GATT, FRANK........................ 33
Cross-examination 34
GATT, JOHN......................... 34
Cross-examination 35
LOCHNANE, JAMES.................. 36
Cross-examination 36
MUSTILLO, ANGELO................. 32
Cross-examination 33
Trial 6
Verdict 9
Writ of Error........................... 42

NAMES AND ADDRESSES OF COUNSEL.

JOHN F. DORE, Esq., 1902–04 L. C. Smith Building, Seattle, Washington,
Attorney for Plaintiff in Error.

THOS. P. REVELLE, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Defendant in Error.

C. T. McKINNEY, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Defendant in Error. [1*]

Comm'r #2370 as to Parent and Mustillo.
Bail $750.00 each.

Direct as to Frank Gatt and John Gatt.

United States District Court, Western District of Washington, Northern Division.

November, 1923, Term.

No. 8363.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK GATT, JOHN GATT, WILLIAM PARENT, *alias* WILLIAM PERRIN, and ANGELO MUSTILLO,
Defendants.

---

*Page-number appearing at foot of page of original certified Transcript of Record.

INFORMATION.

BE IT REMEMBERED, that Thos. P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes in his own person, comes here into the District Court of the said United States for the District aforesaid on this 6th day of March, in this same term, and for the said United States gives the Court here to understand and be informed that as appears from the affidavit of Gordon B. O'Harra, made under oath, herein filed: [2]

COUNT I.

That on the eleventh day of November, in the year of our Lord one thousand nine hundred and twenty-three, about 8 miles north of the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, FRANK GATT, JOHN GATT, WILLIAM PARENT, *alias* WILLIAM PERRIN, and ANGELO MUSTILLO, then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, ten (10) one-fifth gallons and nineteen (19) ounces of a certain liquor known as gin, three (3) one-fifth gallons of a certain liquor known as whiskey, five (5) pints of a certain liquor known as champagne, and two hundred ninety-nine (299) pints of a certain liquor known as beer, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit

for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said Frank Gatt, John Gatt, William Parent, *alias* William Perrin, and Angelo Mustillo, for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said Frank Gatt, John Gatt, William Parent, *alias* William Perrin, and Angelo Mustillo, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [3]

And the said United States Attorney for the said Western District of Washington, further informs the Court:

COUNT II.

That prior to the commission by the said FRANK GATT of the said offense of possessing intoxicating liquor herein set forth and described in manner and form as aforesaid, said FRANK GATT, on the 8th day of November, 1922, in cause No. 5993, at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the offense of possessing intoxicating liquor on the 16th day of May, 1921, in violation of the said Act of Congress known

as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT III.

That prior to the commission by the said ANGELO MUSTILLO of the said offense of possessing intoxicating liquor herein set forth and described in manner and form as aforesaid, said ANGELO MUSTILLO, on the fifth day of June, 1923, in cause No. 7334, at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the offense of possessing intoxicating liquor on the 16th day of December, 1922, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [5]

And the said United States Attorney for the said Western District of Washington, further informs the Court:

COUNT IV.

That on the eleventh day of November in the year of our Lord one thousand nine hundred and twenty-three, about 8 miles north of the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdic-

tion of this court, and at a certain place known as the Lakeview Roadhouse, FRANK GATT, JOHN GATT, WILLIAM PARENT, *alias* WILLIAM PERRIN, and ANGELO MUSTILLO, then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, gin, whiskey, champagne, beer, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said FRANK GATT, JOHN GATT, WILLIAM PARENT, *alias* WILLIAM PERRIN, and ANGELO MUSTILLO, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.
J. W. HOAR,
Special Assistant United States Attorney.

[Endorsed]: Filed Mar. 6, 1924. [6]

[Title of Court and Cause.]

ARRAIGNMENT AND PLEA.

Now on the 7th day of April, 1924, the above defendants Frank Gatt and Angelo Mustillo come into open court for arraignment, accompanied by their attorney Bert Northrup and say their true names are Frank Gatt and Angelo Mustillo. Whereupon, the Information is read and they here and now enter their pleas of not guilty. Plea of John Gatt is continued to day of trial.

Journal No. 12, page No. 145. [7]

[Title of Court and Cause.]

TRIAL.

Now on this 4th day of June, 1924, the above defendants come into open court for trial. Defendants Frank Gatt, John Gatt and Angelo Mustillo are present in court with their attorney John F. Dore and C. T. McKinney is present in behalf of the Government. Defendant John Gatt is now arraigned and says that his true name is John Gatt. Whereupon he here and now enters his plea of not guilty. A jury is empanelled and sworn as follows: T. H. Pattison, Claude F. Jaynes, P. S. Turner, Abner Brown, Don Gartside, Claude A. Andrews, Sydney Nourse, John P. Hayes, M. A. Jewell, Hamilton G. Dawson, William Bullow, and John Bachmann. Opening statement is made to the jury

for the Government by C. T. McKinney. Government witnesses are sworn and examined as follows: Gordon B. O'Harra, Charles A. McFarland, W. M. Whitney, and Walter M. Justi. Government exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 are introduced as evidence. Government rests. Each of the above-named defendants challenges the sufficiency of the Government's evidence and moves for a dismissal. Said motion is denied and exception is allowed. Defendant's witnesses are sworn and examined as follows: Angelo Mustillo, Frank Gatt, John Gatt and James A. Lochnane. Defendant's Exhibit "A" is introduced as evidence. Defendants rest. Defendants challenge the sufficiency of the Government's evidence and move for a directed verdict as to all defendants. Said motion is granted as to John Gatt and the Clerk is ordered to enter a judgment of not guilty as to said John Gatt and judgment of not guilty is now accordingly entered as to said John Gatt. The motion is denied as to defendants Frank Gatt and Angelo Mustillo. Exception is allowed. [8] Said cause is argued to the jury for both sides and the jury after being instructed by the Court, retires for deliberation. Jury again came into court at 3:20 o'clock P. M. Defendants and attorneys for both sides are present and the jury return a verdict of guilty as to Frank Gatt and Angelo Mustillo. Sentence for defendants Frank Gatt and Angelo Mustillo are passed at this time. Verdict is ordered filed and reads as follows: "We, the jury in the

above-entitled cause, find the defendant, Frank Gatt, is guilty as charged in Count I of the Information herein; and further find the defendant, Angelo Mustillo, is guilty as charged in Count I of the Information herein; and further find the defendant, Frank Gatt, is guilty as charged in Count II of the Information herein; and further find the defendant, Angelo Mustillo, is guilty as charged in Count III of the Information herein; and further find the defendant, Frank Gatt, is guilty as charged in Count IV of the Information herein; and further find the defendant, Angelo Mustillo, is guilty as charged in Count IV of the Information herein. C. A. Andrus, Foreman."

John F. Dore, attorney for defendants, Frank Gatt and Angelo Mustillo, moves orally in open court for a new trial for said defendants, and the Court having considered the motion denies the same, with exception allowed defendants. Upon motion of said defendants for an order fixing the amount of supersedeas bond on appeal, it is ordered that the same be fixed for defendant Frank Gatt in the sum of $1000.00, and for defendant Angelo Mustillo, in the sum of $750.00.

Whereupon court stands adjourned to June 5, 1924, at 10 A. M.

Journal No. 12, page No. 263. [9]

[Title of Court and Cause.]

VERDICT.

We, the jury of the above-entitled cause, find the defendant, Frank Gatt, is guilty as charged in Count I of the Information herein; and further find the defendant, Angelo Mustillo, is guilty as charged in Count I of the Information herein; and further find the defendant, Frank Gatt, is guilty as charged in Count II of the Information herein; and further find the defendant, Angelo Mustillo, is guilty as charged in Count III of the Information herein; and further find the defendant, Frank Gatt, is guilty as charged in Count IV of the Information herein; and further find the defendant, Angelo Mustillo, is guilty as charged in Count IV of the Information herein.

C. A. ANDRUS,
Foreman.

[Endorsed]: Filed Jun. 4, 1924. [10]

[Title of Court and Cause.]

SENTENCE (FRANK GATT).

Comes now on this 4th day of June, 1924, the said defendant, Frank Gatt, into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and

judgment had against him, and he nothing says save as he before hath said, wherefore, by reason of the law and premises, IT IS CONSIDERED ORDERED, and ADJUDGED by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the King County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of 100 days on Count IV and to pay a fine of $250.00 on Count I, and the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

Judgment & Decree Book No. 4, page 142. [11]

[Title of Court and Cause.]

SENTENCE (ANGELO MUSTILLO).

Comes now on this 4th day of June, 1924, the said defendant, Angelo Mustillo, into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said, wherefore, by reason of the law and the premises, it is CONSIDERED, ORDERED, and ADJUDGED by the Court that the defendant is guilty of violating the

National Prohibition Act and that he be punished by being imprisoned in the King County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of fifty days on Count IV and to pay a fine of $100.00 *Dollars* on Count I, and the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

Judgment & Decree Book No. 4, page 142. [12]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

In the Above-entitled Court, and to the Honorable GEORGE M. BOURQUIN, Judge thereof:

Comes now the above-named defendants, Frank Gatt and Angelo Mustillo, and by his attorney and counsel, respectfully shows that on the 4th day of June, 1924, a jury impaneled in the above-entitled court and cause, returned a verdict finding the defendants above named guilty of the charge in Counts 1, 2, 3 and 4 of the Information contained, which information was theretofore filed in the above-entitled court and cause, and thereafter, and within the time limited by law, under rules and order of this Court, said defendants moved for a new trial, which said motion was by the Court overruled and

exception thereto allowed; and likewise within said time filed their motion for arrest of judgment, and which was by the Court overruled, and to which an exception was allowed; and thereafter and on the 4th day of June, 1924, said defendants was, by order and judgment of the Court above entitled, in said cause, sentenced to *service,* in the case of Frank Gatt to one hundred days in the County Jail, and a fine of $250.00, and in the case of Angelo Mustillo, to fifty days in the [13] county jail and a fine of $100.00.

And your petitioners, feeling themselves aggrieved, by this verdict, and the judgment and sentence of the Court, entered herein as aforesaid, and by the orders and rulings of this Court, and proceedings in said cause, now herewith petitions this court for an order allowing them to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that said proceedings as herein recited, and as more fully set forth in the assignment of errors presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by the Circuit Court of Appeals corrected, and for that purpose a writ of error thereon should issue as by law and the rulings of the Court provided, and wherefore, premises considered, your petitioners pray that a writ of error issue to the end that said proceedings of the District

Court of the United States for the Western District of Washington, may be reviewed and corrected, said errors in said record being herewith assigned and presented herewith, and that pending the final termination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination, said defendants be admitted to bail.

JOHN F. DORE,
Attorney for Petitioners. [14]

Acceptance of service of within petition for writ of error acknowledged this 4th day of June, 1924.

———————,
Attorney for Plaintiff.

[Endorsed]: Filed Jun. 4, 1924. [15]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now Frank Gatt and Angelo Mustillo, the above-named defendants, and each of them, and in connection with this petition for writ of error in this case submitted, and filed herewith, assign the following errors which the defendants aver and say occurred in the proceedings, and in the above-entitled court, and upon which they rely to reverse, set aside and correct the judgment and sentences entered herein, and say that there is manifest error appearing upon the face of the record and in the proceeding in this:

I.

That the Court erred in admitting the documents seized at Lake View Inn.

II.

That the Court erred in admitting the lumber bill.

III.

That the Court erred in permitting on cross-examination testimony as to the nationality of the codefendant Parent. [16]

IV.

That the Court erred in denying the motion for a directed verdict.

V.

That the Court erred in denying the motion for a new trial.

VI.

The Court erred in entering judgment and sentence upon the verdict.

VII.

The Court erred in admitting evidence as to telephone conversations and reputed ownership.

And as to each and every assignment of error, as aforesaid, defendants say that at the time of making the order or the ruling of the Court complained of, the defendants duly asked and were allowed an exception to the ruling and order of the Court.

JOHN F. DORE,
Attorney for Defendants.

Acceptance of service this 4th day of June, 1924.

THOS. P. REVELLE.

[Endorsed]: Filed Jun. 4, 1924. [17]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF SUPERSEDEAS BOND.

A writ of error is granted herein this 4th day of June, 1924, and it is further

ORDERED, that said defendants, Frank Gatt and Angelo Mustillo, be admitted to bail, and the amount of a super*c*edeas bond to be filed by said defendants be fixed in the sum of $1,000 for Frank Gatt, and $750.00 for Angelo Mustillo. Bonds to provide for payment of fines imposed as well as for surrender of defendants.

ORDERED, That upon said defendants Frank Gatt and Angelo Mustillo filing their said bonds in the aforesaid amounts in due form, to be approved by the Clerk of this court, they shall be released from custody pending the determination of the writ of error herein assigned.

Done in open court this 4th day of June, 1924.

BOURQUIN,
Judge.

Acceptance of service of within order allowing writ acknowledged this 4th day of June, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed Jun. 4, 1924. [18]

[Title of Court and Cause.]

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Frank Gatt, as principal and National Surety Company, as surety, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of One Thousand ($1000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above-named defendant, Frank Gatt was on the 4th day of June, 1924, sentenced in the above-entitled case to serve a period of one hundred days imprisonment in the county jail of King County, Washington, and pay a fine of Two Hundred Fifty ($250.00) Dollars; And, whereas, the said defendant has sued out a writ of error from the sentences and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit; and whereas, the above-entitled Court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of One Thousand Dollars ($1000.00);

Now, therefore, if the said defendant, Frank Gatt shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made, in the prem-

ises, and shall render himself amenable to and obey all process issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall pursuant to any order issued by said District Court surrender himself and obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 4th day of June, 1924.

FRANK GATT,
Principal.
NATIONAL SURETY COMPANY,
By C. B. WHITE, (Seal)
Attorney-in-fact.

Approved.

F. M. HARSHBERGER,
Clerk.

Approved.

J. W. HOAR,
Spec. Asst. U. S. Atty.

[Endorsed]: Filed Jun. 4, 1924. [19]

[Title of Court and Cause.]

BAIL BOND PENDING WRIT OF ERROR.

We, Angelo Mustillo, as principal, and the National Surety Company, as surety, jointly and severally acknowledge ourselves indebted to the United States of America, in the sum of seven hundred and fifty dollars ($750.00), lawful money of the United States of America, to be levied on our, and each of our goods, chattels, lands and tenements, upon this condition:

Whereas, the said Angelo Mustillo has sued out a writ of error from the judgment of the District Court of the United States for the Western District of Washington, Northern Division, in the cause and in said court wherein the United States of America was plaintiff and the said Angelo Mustillo is defendant, for a review of said judgment in the United States Circuit Court of Appeals for the Ninth Circuit.

Now, if the said Angelo Mustillo shall appear and surrender himself in the District Court of the United States for the Western District of Washington, Northern Division, on and after filing in said District Court of the mandate of the said Circuit Court of Appeals, and from time to time thereafter, as he may be required to answer any further proceedings, and abide and perform any judgment or order which may be had or rendered therein in this cause, and shall abide by and perform any judgment or order which may be rendered in said United States Circuit Court of Appeals for the Ninth

Circuit, and not depart from said District Court without leave thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

WITNESS our hands and seals, this 4th day of June, 1924.

ANGELO MUSTILLO.
NATIONAL SURETY COMPANY.
By C. B. WHITE, (Seal)
Attorney-in-fact.

Approved.

F. M. HARSHBERGER,
Clerk.

Approved.

J. W. HOAR,
Spec. Asst. U. S. Atty.

[Endorsed]: Filed Jun. 4, 1924. [20]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JUNE 30, 1924, FOR FILING BILL OF EXCEPTIONS.

For good cause shown, it is hereby ORDERED that the time for filing the bill of exceptions in the above-entitled cause be and the same hereby is extended to and including the 30th day of June, 1924.

WM. H. SAWTELLE,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

Copy rec'd., 6/30/24.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Filed Jun. 30, 1924. [21]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JULY 20, 1924, FOR FILING RECORD.

For good cause shown, it is hereby ORDERED that the time for preparing and filing the record in the above-entitled cause in the United States Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 20th day of July, 1924.

Done in open court, this 20th day of June, 1924.

WM. H. SAWTELLE,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

Copy received 6/30/24.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Filed Jun. 30, 1924. [22]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING SEPTEMBER 15, 1924, for FILING RECORD.

For good cause shown, it is ORDERED that the time for filing the record in the above-entitled cause in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 15th day of Sept., 1924.

Done in open court, this 23d day of July, 1924.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Jul. 23, 1924. [23]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 31, 1924, FOR FILING RECORD.

For good cause shown, it is hereby ORDERED that the time for filing the record in the above-entitled cause in the Circuit Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 31st day of October, 1924.

Done in open court this 17th day of October, 1924.

JEREMIAH NETERER,

Judge.

O. K.—J. W. HOAR,

Spec. Asst. U. S. Atty.

[Endorsed]: Filed Oct. 17, 1924. [24]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 4th day of June, 1924, at the hour of 10:00 o'clock A. M., the above-entitled cause came on regularly for trial in the above-entitled court, before the Honorable George M. Bourquin, Judge thereof, the plaintiff appearing by Thomas P. Revelle and C. T. McKinney, United States Attorney and Assistant United States Attorney, respectively, and the defendants appearing in person and by John F. Dore, his counsel.

A jury having been regularly and duly impanelled and sworn to try the cause, and the Assistant United States Attorney having made a statement to the jury, the following evidence was thereupon offered:

TESTIMONY OF GORDON B. O'HARA, FOR THE GOVERNMENT.

GORDON B. O'HARA, a witness produced on behalf of the Government, being duly sworn, testified as follows:

I was a federal prohibition agent on November 11, 1923. As such officer on that day I visited the Lakeview Inn, in Victory Highway, near Seattle. About 12:30 in the morning of November 11th, several of the agents, including myself, went to Lakeview Inn. [25] Two or three of us went to the back door and some went to the front door. We rang the door-bell or knocked on the door. A Japanese attendant came and looked out of the window, and then he went and got Billie Parent. He came and looked at us and refused to admit us. Some of us broke open the back door and some broke open the window and we gained admission that way and a search-warrant was served on them in that way. We searched the place. Upstairs in the room in the southeast corner of the building a secret cache was found. There was a board out over the door of the cache and several coat-hangers. There was one specially constructed coat-hanger that went clear through a hole and fastened on to the machinery on the inside. By pulling the coat-hanger out it released the locks to the door and it came open. In there we found eight sacks of Canadian beer, twenty-four bottles each; something over a hundred bottles of beer on ice, several bottles of gin, three

(Testimony of Gordon B. O'Hara.)
or four bottles of champagne and several bottles of whiskey in this cache. The defendant Mustillo was there. Parent was there, but neither of the Gatts were there. We made search of Mustillo's room in the basement and made a search of his person at that time. Nobody was with me when I went down. Mustillo asked me to destroy the papers I found in order that he might not be implicated in the case. The premises were a road-house, in the northeast corner of which was a little barroom with a large door and a large window. On the west side of this little room there was a bar in front, and all the bar fixtures. In the main room and just in front of this bar was the dancing-hall, and upstairs there were bedrooms and in the basement there were bedrooms and a kitchen. It is a large residence converted into a road-house. In this barroom they had whiskey serving-glasses and all the equipment for serving liquor.

Q. Showing you Government's Exhibit 1, marked for Identification, I will ask you if you have seen that before. [26]

A. Yes, I saw that before.

Q. Where?

A. The early morning of November 11th.

Mr. DORE.—Might I ask a few questions for the purpose of objecting to the competency of this evidence?

The COURT.—Yes.

(By Mr. DORE.)

Mr. O'Hara you had a search-warrant to search

(Testimony of Gordon B. O'Hara.)

for liquor, did you not?

The COURT.—Yes, he said so; all right.

Q. On that search-warrant you went through these rooms, this man's bedroom, and searched it for documents and papers?

A. In searching it for evidence—

Q. You found those as a result of the search?

A. I found these cards on the person of the defendant, and these slips I took out of his room.

Mr. DORE.—I object to what they found in the room.

The COURT.—The Court holds that counsel has a right to offer all these.

(Papers marked as an exhibit.)

Q. Do you know when the defendants Gatt were apprehended? A. No, I don't know.

Q. Who were the owners of these premises?

Mr. DORE.—I object to that as calling for a conclusion; that is a matter to be determined by the jury.

The COURT.—It may be a conclusion of an ultimate fact. If he knows the owner—whether he does, or not, may develop on cross-examination. If you know you may answer.

Same objection by defendant, and an exception allowed.

A. The defendants Gatt Brothers. Mustillo told me he was one of the employees there that did the serving, and those slips were his slips. He did not tell me by whom he was employed. (Tr., pp. 3–8.) [27]

(Testimony of Gordon B. O'Hara.)

Cross-examination.

Q. When you say the Gatts owned the place, what facts do you base that upon,—I mean of your own knowledge?

A. Well, more from the reputation of the place.

Q. You mean that you heard people say that the Gatts owned it?

A. Yes, people out in that neighborhood.

Q. You heard people out in that neighborhood say that John and Frank Gatt owned it? Did they mention both of them?

A. Both of them, the Gatt Brothers, on the same line; yes.

Q. Gatt Brothers? A. Yes, sir.

Q. That is what you base your answer on, was on reports?

A. Yes, sir, and on papers we got out of the defendants.

Mr. DORE.—I suggest that the Gatt Brothers owned the place be stricken on the ground that it is based on hearsay.

The COURT.—That is part of the proof of ownership, that those who are reputed to be owners in respect to all property are presumed to be is the law in many states by statute. Motion denied. Exception allowed. (Tr., pp. 8, 9.)

TESTIMONY OF CHARLES R. McFARLAND, FOR THE GOVERNMENT.

CHARLES R. McFARLAND, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

My name is Charles R. McFarland. I operate the McFarland Lumber Company on East 125 Street and Victory Way, probably a mile and a quarter from Lakeview Inn. I sold one of the Gatt Brothers lumber. I identify Frank Gatt. I have a ledger sheet showing charges. Mr. Gatt came to my office. I took the lumber myself to Lakeview Inn. The bill has not been paid. No one was present on the premises when I delivered the lumber. I have a delivery ship, delivered July with the signature of John Gatt.

(Government's Exhibit 3, marked for Identification.) [28]

The lumber called for in Exhibit 3, my truck driver delivered. His name is Clint Lyle. I was not present when the signature was made. The bills are made out in the office; the driver takes the receipt when he delivers lumber.

Cross-examination.

I am positive I saw Frank Gatt in my office. I could not say what day nor what month it was. It was in the fall of 1923. The bill was $2.84.

TESTIMONY OF W. M. WHITNEY, FOR THE GOVERNMENT.

W. M. WHITNEY, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am assistant prohibition director for the State of Washington and was such November 11, 1923. On that day I visited the Lakeview Inn, on Victory Highway. A search-warrant was served. There were present Mr. Parent, the cook, a Japanese woman and Mustillo. We first searched the barroom, a little room in the northeast corner of the building, connected with the dance-hall. This dance-hall has booths with at least two seats in them on which they can be served on these little tables, and get up and dance on the floor on the floor in the center. There were two or three other small dining-rooms or serving-rooms on the north side of the house. The barroom had a cash register, a large number of whiskey glasses, cocktail glasses and small size beer glasses. In the cash register I found a number of checks which had been returned N. S. F., all endorsed. (Government's Exhibit 4 for Identification.) These were all found in the cash register. Also that notice of protest, Royal Bank of Canada, in the desk register. Witness describes the liquor found. I heard part of the conversation between Mustillo and O'Hara. He

(Testimony of W. M. Whitney.)
said he stayed at this place all the time and was responsible for serving the liquor. (Tr. pp. 16–19.) [29]

Cross-examination.

Parent was downstairs. The Japanese maid had a room upstairs. And Mustillo was there. No liquor was found in Mustillo's room and none was found on him. He said he was an employee. (Tr. pp. 19, 20.)

TESTIMONY OF F. M. HARSHBERGER, FOR THE GOVERNMENT.

Attorney for defendants admits the prior conviction set out in the two counts are correct.

Bottles of liquor received in evidence and marked Government's Exhibits 7, 8, 9 and 10, without objection.

Government's Exhibits 1 and 2 offered in evidence, to which defendants on the ground they were obtained as a result of an illegal search and seizure, the search-warrant calling for liquor.

The COURT.—When they once enter a house lawfully they can take everything that may be of an unlawful nature, or evidence of. It would be preposterous to say that if while searching for liquor they found a set of counterfeit moulds they could not take them. Objection overruled, an exception noted. Documents received in evidence.

Search-warrant and accompanying affidavit received in evidence, marked Government's Exhibit

11. Cards taken from the room of the defendant Mustillo, with the name of the Lakeview Inn upon them, and certain other information. One of the slips reads "43 beers $43, 5 sacks beer $60, ½ pint whiskey, 4 sandwiches $4; $3 for driver, total cash $113.25."

Mr. McKINNEY.—These are customer's slips.

Mr. DORE.—I object on the ground that they are incompetent, irrelevant, and immaterial, not connected with the defendants, and not sufficiently identified.

Objection overruled. Exception allowed. (Tr., pp. 21–23.) [30]

Government's Exhibit 2, offered over the objection of the defendants, admitted, and an exception allowed.

Government's Exhibit 3 admitted over defendant's objection and an exception allowed.

The COURT.—I think this is identified. The exhibit will be admitted save and except the signature.

Mr. DORE.—Note an exception to the admission of any part of it.

Government's Exhibit 4, N. S. F. checks, admitted over the objection of the defendants and an exception allowed.

Government's Exhibits 7, 8, 9 and 10 admitted without objection. (Tr., pp. 24–25.)

TESTIMONY OF WALTER M. JUSTI, FOR THE GOVERNMENT.

WALTER M. JUSTI, a witness produced on behalf of the Government, being duly sworn, testified as follows:

I was present on November 11, 1923, at the time the agents visited Lakeview Inn.

Q. I will ask you if you know who the proprietors of that place are?

A. Mr. John Gatt and Mr. Frank Gatt.

Objected to on the ground that it is hearsay. Objection overruled. Exception noted.

Cross-examination.

I know that they were the owners because I have been told so by telephone reports. I could not identify the people on the telephone. I don't know what mon*ey* it was I had the telephone conversations. It was in the year 1923. Somebody called up on the telephone and said the Lakeview Inn was selling booze and was being operated by Frank Gatt and John Gatt. The person telephoning did not give his name. I do not know the name of any of the persons. I got from three to six telephone calls during the year 1923.

Mr. DORE.—I move that the testimony of this witness be stricken. [31]

The COURT.—Motion denied.

An exception noted.

W. M. WHITNEY, FOR THE GOVERNMENT (RECALLED).

I know that the defendants Gatt own the place because I have been told so.

Mr. DORE.—I move that be stricken as hearsay, and the jury instructed to disregard it.

The COURT.—Denied. We know the Government owns this building. We know it by reputation. We didn't see the title deeds *of* anything of that sort. A disputable presumption of ownership arises from common reputation of ownership.

An exception is allowed.

Government rests.

Each of the defendants challenges the sufficiency of the evidence to sustain a verdict as to each and every count, and moves for a directed verdict. The motion is denied and an exception noted.

TESTIMONY OF ANGELO MUSTILLO, FOR THE DEFENDANTS.

ANGELO MUSTILLO, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

My name is Mustillo, I was in the Lakeview Inn, as employed as janitor to take care of the grounds outside. I had nothing to do inside. I worked there six or seven months prior to the 11th of November, 1923. I was employed by William Parent. I heard the owner was John Valenti.

(Testimony of Angelo Mustillo.)
William Parent was the man who hired me and paid me my wages. The house contains six or seven rooms and the grounds are several acres. I was sleeping downstairs in the basement. I got $75 a month and board. I never saw the papers that were in my room before. It is not my handwriting on any of them. My room in the basement was open at all times. I never owned any [32] liquor in the place.

Cross-examination.

I take care of the lawn. It is not a fact that the grounds surrounding the Lakeview Inn is a bunch of woods. I had to keep the property nice and clean. The front yard is about half an acre. I had to clean and to split wood. (Tr., pp. 32–35.)

TESTIMONY OF FRANK GATT, FOR THE DEFENDANTS.

FRANK GATT, a witness produced on behalf of the defendants, being fully sworn, testified as follows:

My name is Frank Gatt; I have been in the restaurant business and barber-shop, and owned the Monte Carlo on Fifth and Jackson for about five years. I never bought any lumber from McFarland Lumber Company; I was never in their office in my life. I never had the management or ownership of the Lakeview Inn. I collected money there. I collected money from William Parent.

(Testimony of Frank Gatt.)
He came down to my place of business, the Monte Carlo. I collected the money for James Lochnane, the owner of the land and building. I loaned Lochnane $600, with the understanding I was to get it back out of the rent of the Lakeview Inn. I had a note for $600 from Lochnane. When he paid the $600 I gave the note back. These are some cancelled checks returned from the bank, endorsed Frank Gatt. That is my signature on the back. At times Mustillo or Parent would bring me down the rent partly in cash and partly in checks. I deposited the checks to my bank account, and when they came back N. S. F. I turned them back to Mustillo or Parent and demanded cash, which they paid. I absolutely owned no liquor in the place and had nothing to do with it. I have been out there two or three times. I collected the rent and applied it to Lochnane's debt and continued to collect the rent until I got the $600. (Tr., pp. 38-41.)

Cross-examination. [33]

Lochnane was recommended to me by William Parent. Parent brought him down to my place of business. My name is Frank Gatt. I also know Parent by the name of Parenti. (Tr., pp. 42, 43.)

TESTIMONY OF JOHN GATT, FOR THE DEFENDANTS.

JOHN GATT, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

(Testimony of John Gatt.)

Direct Examination.

I never had any interest in the Lakeview Inn. I had a chicken dinner there occasionally. I never did buy or receive any lumber for the place.

Cross-examination.

I am not in any business now. I was in the dance hall business with a man by the name of Seresse and my brother. We never was in business under the name of Gatt Brothers. The signature on Government's Exhibit 3, at the bottom, looks a little like mine. I was not interested in the Lakeview Inn. I knew Mustillo and also knew Parent.

Q. What is Parent's nationality, if you know?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial, the nationality of any defendant.

The COURT.—I think I can see the purpose; it is cross-examination; he may answer.

An exception is noted.

A. Italian.

Q. What is yours?

Same objection, same ruling, and an exception noted.

A. Italian.

TESTIMONY OF JAMES LOCHNANE, FOR THE DEFENDANTS. [34]

JAMES LOCHNANE, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination.

I was the owner of the land and the building on the land where the Lakeview Inn was located. I leased it in 1922 and '23. Valenti was the man who leased it. Billie Parent was manager every time I was out there. I never had any dealings with Frank Gatt, except to borrow money from him. I gave him a note and when I paid the money back I got the note. Note marked Defendant's Exhibit "A." I sold the place some time the first of April. The ground is an acre.

Cross-examination.

Gatt collected the rent to pay back his note. The place was being used as a chicken dinner place. I met Valenti once at the bank at the corner of Fifth and Jackson Street. The lease was written in the bank. Frank Gatt was there at the time. His place is next door to the bank. He was one of the men who produced the lessee, the man who leased the place. And Billy Parent was there; that is how I happened to be down there. I have not seen Valenti since. I was getting $75 a month for the place.

Defendants move for a dismissal and a directed verdict as to each of the defendants on each and every count of the indictment, and challenge the sufficiency of the evidence on each and every count.

Motion is sustained as to defendant John Gatt and a directed verdict granted. Motion denied as to the other defendants, and an exception allowed.

Defendants rest.

And now, in furtherance of justice, and that right may be done, the said defendants, Frank Gatt and Angelo Mustillo, tender and present to the court the foregoing as their bill of exceptions in the above-entitled cause, and prays that the same may be settled and allowed [35] and signed and sealed by the Court and made a part of the record in this cause.

JOHN F. DORE,
Attorney for Defendants.

Rec'd and approved.

C. T. McKINNEY,
Asst. U. S. Atty.

Acceptance of service of within bill of exceptions acknowledged this 30th day of June, 1924.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Lodged Jun. 30, 1924.

[Endorsed]: Filed Oct. 4, 1924. [36]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

The defendants, Frank Gatt and Angelo Mustillo, having tendered and presented the foregoing as their bill of exceptions in this cause to the action of the Court, and, in furtherance of justice and that right may be done them, and having prayed that the same may be settled and allowed, authenticated, signed and sealed by the Court and made a part of the record herein; and the Court having considered said bill of exceptions and all objections and proposed amendments made thereto by the Government, and being now fully advised, does now in furtherance of justice and that right may be done the defendants, sign, seal, settle and allow said bill of exceptions as the bill of exceptions in this cause, and does order that the same be made a part of the record herein.

The Court further certifies that each and all of the exceptions taken by the defendants, as shown in said bill of exceptions, were at the time the same were taken allowed by the Court.

The Court further certifies that said bill of exceptions contains all the material matters and evidence material to each and every assignment of error made by the defendants and tendered and filed in court in this cause with said bill of exceptions.

The Court further certifies that said bill of exceptions [37] was filed and presented to the court within the time provided by law, as extended by the orders of the court heretofore made herein.

Done and ordered in open court, counsel for the Government and defendants being now present, this 2 day of October, 1924.

BOURQUIN,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Oct. 4, 1924. [38]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make a transcript of record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, and include therein the following:

Information.

Plea.

Record of trial and impanelling jury.

Verdict.

Motion in arrest of judgment.

Motion for new trial (minute entry).

Order denying motion for new trial (minute entry).

Judgment and sentence.

Petition for writ of error.

Assignments of Error.

Order allowing writ of error and fixing amount of bonds.

Appeal and bail bonds.

All orders extending time for filing bill of exceptions.
All orders extending time for filing record.
Bill of exceptions.
Order settling bill of exceptions.
Writ of error. [39]
Citation.
Defendants' praecipe.

JOHN F. DORE,
Attorney for Defendants.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.

JOHN F. DORE,
Attorney for Plaintiffs in Error.

[Endorsed]: Filed Oct. 16, 1924. [40]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to

40, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as is required by the praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [41]

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate or return, 84 folios at 15¢	$12.60
Certificate of Clerk to transcript of record, 4 folios at 15¢	60
Seal to said certificate	20

I hereby certify that the above cost for preparing and certifying record, amounting to $13.40, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 23d day of October, 1924.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [42]

[Title of Court and Cause.]

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before the Honorable George M. Bourquin, between Frank Gatt and Angelo Mustillo, the plaintiffs in error, and the United States of America, the defendant in error, a manifest error hath happened to the prejudice and great danger of Frank Gatt and Angelo Mustillo, plaintiffs in error, as by their complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings

with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, [43] State of California, together with this writ, so that you have the same at said City of San Francisco within thirty days from the date hereof, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being then and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what *or writ,* and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 4th day of June, 1924, and the year of the Independence of the United States one hundred and forty-seven.

[Seal] F. M. HARSHBERGER,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Acceptance of service of within writ of error, acknowledged this 4th day of June, 1924.

——————,

Attorney for Plaintiff. [44]

Copy received May 4, 1924.

THOS. P. REVELLE,

Atty. for Ptff.

[Endorsed]: Filed Jun. 4, 1924. [45]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to THOMAS P. REVELLE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Frank Gatt and Angelo Mustillo are plaintiffs in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

June 4, 1924.

BOURQUIN,
U. S. District Judge. [46]

Copy received May 4, 1924.

THOS. P. REVELLE,
Atty. for Ptff.

[Endorsed]: Filed Jun. 4, 1924. [47]

[Endorsed]: No. 4691. United States Circuit Court of Appeals for the Ninth Circuit. Frank Gatt and Angelo Mustillo, Plaintiffs in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed September 14, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4691

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK GATT,

Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA,

Defendant-in-Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF-IN-ERROR.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Plaintiff-in-Error,
Seattle, Washington.

J. L. MACDONALD CO., PRINTERS AND PUBLISHERS, SEATTLE

FILED
OCT
F. D. MONCKTON,

No. 4691

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK GATT,

Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA,

Defendant-in-Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF-IN-ERROR.

JOHN F. DORE,

F. C. REAGAN,

Attorneys for Plaintiff-in-Error,

Seattle, Washington.

STATEMENT.

The plaintiff-in-error, Frank Gatt, Angelo Mustillo, John Gatt and William Parent, were charged in an information containing four counts. The first count charged that the four defendants possessed certain intoxicating liquor; count II charged the plaintiff-in-error, Frank Gatt, with a prior conviction of possessing intoxicating liquor; count III charged Angelo Mustillo with a prior conviction of possessing intoxicating liquor, and count IV charged all of the defendants with maintaining a common nuisance (Tr. pp. 2-5).

The plaintiff-in-error was found guilty on counts I, II and IV; Angelo Mustillo was found guilty on counts I, III and IV (Tr. p. 9).

A directed verdict was granted as to the defendant John Gatt (Tr. p. 37). William Parent, the remaining defendant, was not tried.

ASSIGNMENTS OF ERROR.

I.

That the court erred in admitting the documents seized at Lake View Inn.

II.

That the court erred in admitting the lumber bill.

III.

That the court erred in permitting on cross-examination testimony as to the nationality of the codefendant Parent (Tr. p. 16).

IV.

That the court erred in denying the motion for a directed verdict.

V.

That the court erred in denying the motion for a new trial.

VI.

The court erred in entering judgment and sentence upon the verdict.

VII.

The court erred in admitting evidence as to telephone conversations and reputed ownership (Tr. p. 14).

ARGUMENT.

Gordon B. O'Hara testified on behalf of the Government that on November 11th, 1923, armed with a search warrant he visited the place described in the information as Lakeview Inn and found the intoxicating liquor set out in count I of the information; that Mustillo was found on the premises as was the defendant William Parent. He also testified that in the search he found certain papers on Mustillo, and in the room occupied by him. Over objection he testified that the Gatt brothers were the owners of the premises. On cross-examination he testified as follows:

> "Q. When you say the Gatts owned the place, what facts do you base that upon,—I mean of your own knowledge?
>
> A. Well, more from the reputation of the place.
>
> Q. You mean that you heard people say that the Gatts owned it?
>
> A. Yes, people out in that neighborhood.
>
> Q. You heard people out in that neighborhood say that John and Frank Gatt owned it? Did they mention both of them?

A. Both of them, the Gatt Brothers, on the same line; yes.

Q. Gatt Brothers?

A. Yes, sir.

Q. That is what you base your answer on, was on reports?

A. Yes, sir, and on papers we got out of the defendants.

Mr. Dore: I suggest that the Gatt Brothers owned the place be stricken on the ground that it is based on hearsay.

The Court: That is part of the proof of ownership, that those who are reputed to be owners in respect to all property are presumed to be is the law in many states by statute. Motion denied. Exception allowed." (Tr. p. 26).

Charles R. McFarland, a Government witness, testified that sometime in the fall of 1923 he sold the Gatt brothers $2.84 worth of lumber which was delivered at Lakeview Inn; that he recognized the plaintiff-in-error, Frank Gatt, as the person who ordered the lumber (Tr. p. 27).

William M. Whitney testified that he was one of the officers in the raid; that the defendant Parent and a Japanese woman and Mustillo were there

at the time that the liquor described in count I of the information was found on the place; that in the cash register was found Government's Exhibit No. 4, being N. S. F. checks and put through the bank by the plaintiff-in-error, Frank Gatt; that Mustillo was an employee and stated at that time that he was responsible for serving the liquor (Tr. p. 28). This witness was recalled and testified as follows:

> "I know that the defendants Gatt own the place because I have been told so.
>
> Mr. Dore: I move that be stricken as hearsay, and the jury instructed to disregard it.
> The Court: Denied. We know the Government owns this building. We know it by reputation. We didn't see the title deeds of anything of that sort. A disputable presumption of ownership arises from common reputation of ownership. An exception is allowed." (Tr. p. 32).

Walter M. Justi testified that he was present on November 11th, 1923, and:

> "Q. I will ask you if you know who the proprietors of that place are?
>
> A. Mr. John Gatt and Mr. Frank Gatt."
> Objected to on the ground that it is hearsay. Objection overruled. Exception noted.

CROSS-EXAMINATION.

"I know that they were the owners because I have been told so by telephone reports. I could not identify the people on the telephone. I don't know what month it was I had the telephone conversations. It was in the year 1923. Somebody called up on the telephone and said the Lakeview Inn was selling booze and was being operated by Frank Gatt and John Gatt. The person telephoning did not give his name. I do not know the name of any of the persons. I got from three to six telephone calls during the year 1923.

MR. DORE: I move that the testimony of this witness be stricken (Tr. p. 31).

THE COURT: Motion denied.

An exception noted (Tr. p. 31)."

The prior convictions were admitted.

A motion for a directed verdict was made by all of the defendants at the close of the Government's case which was denied and an exception noted (Tr. p. 32).

Mustillo testified that he was employed at the Lakeview Inn as janitor to take care of the grounds outside; that he had nothing to do with the place; that he had worked there seven months prior to the date of his arrest and that he was employed by

the defendant William Parent; that he never saw the papers that were in his room and that they were not in his handwriting; that he never owned any liquor on the place (Tr. p. 32).

The plaintiff-in-error, Frank Gatt, testified that he was in the restaurant and barber business and had owned the Monte Carlo at 5th and Jackson for five years; that he never bought any lumber from the McFarland Lumber Company and was never in their office in his life; that he had nothing to do with the Lakeview Inn; that he collected money there for James Lochnane, the owner of the property; that he had loaned James Lochnane six hundred ($600.00) dollars with the understanding that he was to get it back from the rent of the Lakeview Inn; that the cancelled checks returned from the bank endorsed Frank Gatt were his signature; that Parent had turned them in on the rent of the property and that he put them through the bank and when they came back N. S. F. he had turned them back to Parent who paid him cash for them; that he owned no liquor at the Lakeview Inn and absolutely had nothing to do with the place; that he collected the rent and applied it on Lochnane's debt until he was paid (Tr. p. 33).

John Gatt testified that he never had any interest in the Lakeview Inn and that he never bought or received any lumber for the place and on cross-examination was asked the following questions:

> "Q. What is Parent's nationality, if you know?
>
> Mr. Dore: I object to that as incompetent, irrelevant and immaterial, the nationality of any defendant.
>
> The Court: I think I can see the purpose; it is cross-examination; he may answer.
>
> An exception noted.
>
> A. Italian.
>
> Same objection, same ruling, and an exception noted.
>
> Q. What is yours?
>
> A. Italian." (Tr. p. 35.)

James Lochnane testified that he was the owner of the land and building; that he leased it in 1922 and 1923 to a man named Valenti; that Billie Parent was the manager; that he never had any dealings with the plaintiff-in-error, Frank Gatt, except to borrow money from him, and Gatt collected the rent to pay back his note (Tr. p. 36).

At the close of all the evidence, the defendants moved for a directed verdict. It was granted as to John Gatt but denied as to the other defendants.

An examination of the testimony given by the Government agents as set out heretofore in this brief will show that the attempt on the part of the Government to connect Frank Gatt with this place was all hearsay evidence. O'Hara's testimony is based upon what people in the neighborhood told him. Whitney says "that he was told." Justi testified to telephone conversations in which he frankly admits he did not know who was talking and did not know what time of the year said conversations occurred. It is true that the witness McFarland identified Frank Gatt as the person to whom he sold $2.84 worth of lumber sometime in the fall of 1923, which lumber was delivered at the Lakeview Inn, and that in the cash register was found certain N. S. F. checks endorsed by Gatt, but nowhere in the record is there to be found any evidence that any human being ever saw the plaintiff-in-error, Frank Gatt, upon these premises, or in any way tending to show that he had anything to do with the management of the same. In other words, there is no substantial evidence that he was

guilty of the crimes charged in the information. The introduction of this hearsay testimony was error. Ownership cannot be proved by reputation.

In *Katz vs. Commissioner of Immigration,* 245 Fed. 316, affidavits were introduced alleging it was a well-known fact that the petitioner was interested in and was associated with the house and it was a generally known fact that Katz conducted, managed and directed the particular house, and this court said:

> "These affidavits and protests contain the strongest showing made against Joseph Katz respecting his alleged receiving of the earnings of a prostitute or prostitutes. The very best that can be made out of the testimony, and the whole thereof contained in the record, is that it is wholly hearsay and based upon common repute in the vicinity; the affiants generally asseverating upon information and belief. There is practically no substantive testimony of fact. Locally—that is, in the State of California—the fact that a house is being conducted as a house of ill fame may be shown by common repute; but there is no rule of which we are aware by which the ownership or management of such a house may be so proven. Of course, if it were shown that Joseph Katz was conducting or managing such a house, it would be a reasonable inference and deduction that he was taking the earnings of the inmates. There is not a syllable of testimony that he accepted

such earnings, except that he was the owner of the house and accepted rentals from the occupant, which in itself, as we have seen, is not sufficient to condemn him under the charge. Some substantive evidence of the fact of managing and conducting such a house, besides mere hearsay and expression of opinion and belief (which is practically the equivalent of no competent evidence of the fact sought to be proven), is necessary upon which to base the inference of his having taken the earnings of the inmates."

In *Backus, Commissioner of Immigration, vs. Katz,* 245 Fed. 320, the evidence tended to show that Katz frequently visited the house many times a day; that he superintended the alterations and repairs; that he was seen taking parcels into the house and it was commonly understood that he conducted and managed this house and that the woman living in the house was known as Nellie Katz and as the Katz woman. This court said:

"There is no substantive proof in the record competent to establish the fact alleged that appellant received or was receiving the earnings of a prostitute. The *Joseph B. Katz* case is therefore decisive of this, and the judgment of the District Court will be affirmed."

In *Crippen vs. State,* 80 S. W. 372, it was held:

"We do not believe it was competent, as was done in this case, to show by witnesses that

the house and business were reputed to belong to defendant. Ownership cannot be proved in this way."

In *Perkins vs. City of Roswell,* 113 Pac. 609, it was contended that it was common knowledge in the neighborhood that the defendant was running a sanatorium, but the court held:

> "Ownership or possession of property or a modus concerning it cannot be shown by reputation." 16 Cyc. 1212. "Title cannot be proved by neighborhood talk."

In *Henry vs. Brown,* 39 So. 328 (Ala.), the Supreme Court of Alabama said:

> "It is never competent to prove ownership by reputation or general understanding."

In *South School District vs. Blakeslee,* 13 Conn. 227, it is held:

> "A man's general character may be proved by reputation, but not his title to real estate."

In *Green vs. Chelsea,* 24 Pick. 80, the Supreme Court of Massachusetts said:

> "Reputation is never evidence of title nor is it ever admissible to support private rights."

Schooler vs. State, 57 Ind. 127.

Steed vs. State, 67 S. W. 328.

Minter vs. State, 150 S. W. 783.

Greenleaf on Evi., Sec. 137.

3 Wigmore on Evi., 2nd ed., Sec. 1587.

16 Cyc. 1211.

Moore vs. Jones, 13 Ala. 303.

Goodson vs. Brothers, 20 So. 443.

Doe vs. Edmondson, 40 So. 505.

Howland vs. Crocker, 7 Allen 153.

Heirs vs. Risher, 32 S. E. 509.

Sexton vs. Hollis, 1 S. E. 893.

Wendell vs. Abbott, 45 N. H. 349.

The rulings of the court in the presence of the jury on the objection to the introduction of this hearsay or reputation evidence was error, for in the presence of the jury he stated:

> "That is part of the proof of ownership, that those who are reputed to be the owners in respect to all property, are presumed to be is the law in many states by statute."

This remark was highly prejudicial—there is no United States statute which allows ownership of property to be proven by reputation.

Again:

"The Court: Denied. We know the Government owns this building. We know it by reputation. We didn't see the title deeds of anything of that sort. A disputable presumption of ownership arises from common reputation of ownership.

An exception is allowed."

These statements are not the law, in fact the rule is otherwise—ownership or title cannot be proven by reputation.

Katz vs. Commissioner of Immigration, and cases cited, *supra.*

This last statement was error and if for no other reason than that the illustration was far fetched, in that, nearly every department of the Federal Government is housed in what is known as the Federal Building, its officers and agents are there and carved in stone on the building is "U. S. Court House—Customs House—Post Office," but in this case no one ever saw the plaintiff-in-error on the premises described in the information.

The defendant Parent was not on trial, yet the court, over objection, allowed the Government to prove Parent's nationality. It was improper under any circumstances, yet the court in ruling stated:

"I think I can see the purpose—it is cross-examination." It was not cross-examination because the witness, John Gatt, had not testified anything about Parent, his nationality or otherwise. It was prejudicial because it was an attempt by innuendo to place all of these defendants in one class; it had no place in the record.

The plaintiff-in-error's motion for a directed verdict at the end of all the evidence should have been granted. The court granted a directed verdict as to the defendant John Gatt. An examination of the record will show that the only difference in the evidence against the plaintiff-in-error, Frank Gatt, and the defendant John Gatt is that Frank Gatt was supposed to have ordered some lumber for the Lakeview Inn and John Gatt was supposed to have received it. Both defendants denied any knowledge of any such transaction. The other difference is that in the cash register there were found certain N. S. F. checks endorsed by the plaintiff-in-error, Frank Gatt. He explained that these checks were for rent and were turned over to him by Parent who was running the place in payment of a debt that the owner of this property owed him, and that he had put them through the bank and when they came

back he had turned them back for cash. Lochnane, the owner, also testified as to this arrangement that Gatt was to collect the rent.

In view of the fact that there is not any competent evidence in the record that Frank Gatt ever had anything to do with this place and the fact that his explanation of these checks was not questioned, and the record being in this condition, it is our contention that the inference of innocence would be fully as justified as the inference of guilt, and under these circumstances it was the duty of the court to grant a motion for a directed verdict. In other words, taking the evidence as a whole and assuming it to be true, together with all reasonable inferences, it is not legally sufficient to support a verdict of guilty, because the circumstances relied on as the evidence of guilt are equally susceptible of inference favorable to innocence.

In *United States vs. Murphy,* 253 Fed. 404, certain letters were introduced by the Government and the court in granting a motion for a directed verdict said:

> "What inference will one draw from the statements contained in all the letters? They

may be innocent, they may be sinister; but no trier of a criminal cause may be allowed to guess."

So in this case, the ordering of the lumber, if Gatt did order it, and the endorsement of the checks are susceptible of an inference of innocence and his explanation and that of Lochnane supports this inference.

Nosowitz vs. United States, 282 Fed. 575.

Union Pacific Coal Co. vs. United States, 173 Fed. 737.

Sullivan vs. United States, 283 Fed. 865.

Hayes vs. United States, 169 Fed. 101.

France vs. United States, 164 U. S. 674.

We respectfully submit that plaintiff-in-error's motion for a directed verdict should have been granted and that it was error for the lower court not to grant it, and that said case should also be reversed because of the introduction of incompetent hearsay evidence.

Respectfully submitted,

JOHN F. DORE,

F. C. REAGAN,

Attorneys for Plaintiff-in-Error.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4691

FRANK GATT,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

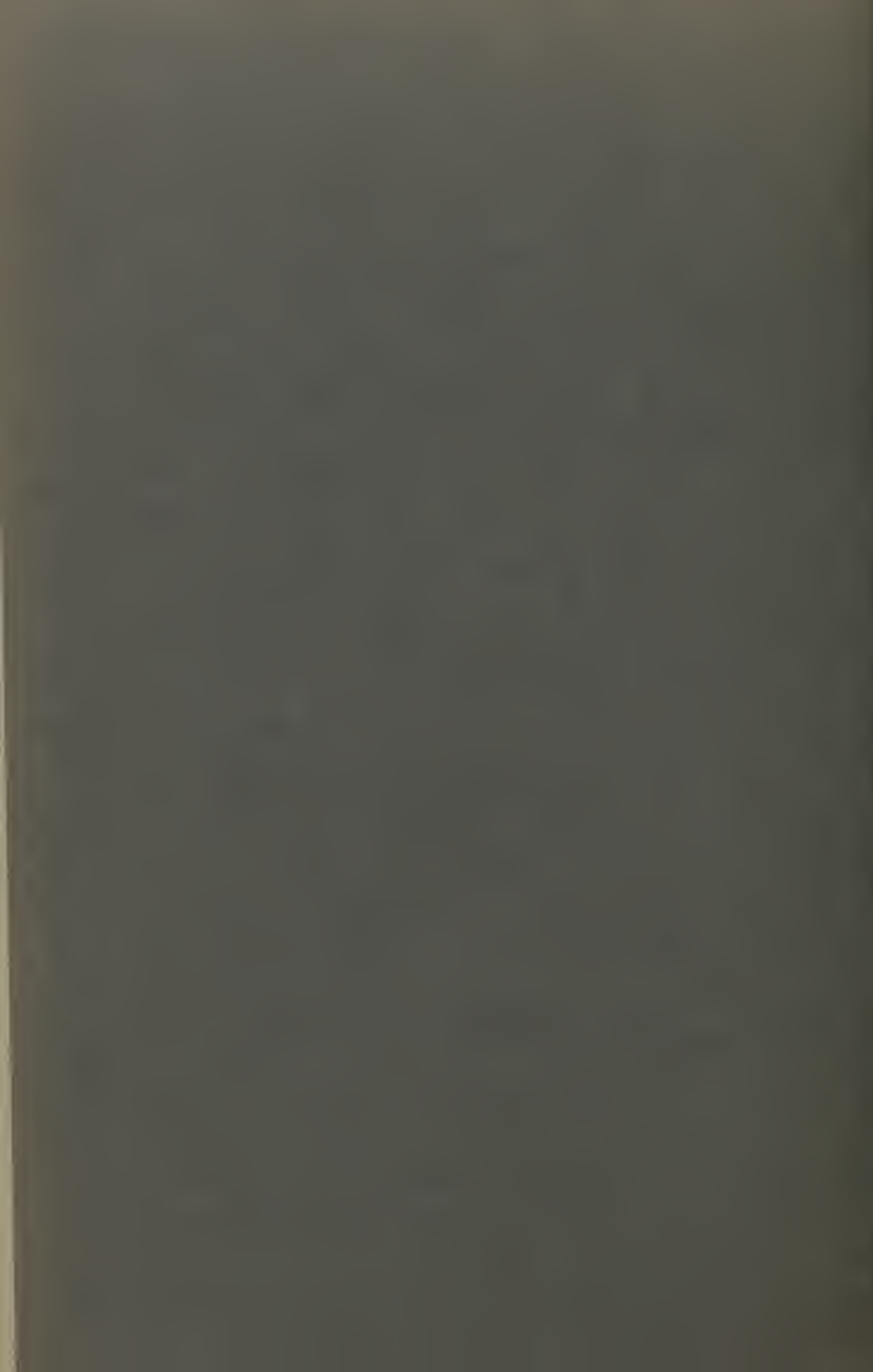
Brief of Defendant-in-Error

THOS. P. REVELLE
United States Attorney

C. T. McKINNEY
Assistant United States Attorney

Attorneys for Defendant in Error

FILED
NOV 2 - 1925
. D. MONCKTO
CL



In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4691

FRANK GATT,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Defendant-in-Error

STATEMENT OF THE FACTS

The place in question is known as the Lakeview Inn, situated on the Victory Highway near the City of Seattle. The agents raided the place and found a Japanese attendant upon the premises and a

person by the name of Billie Parentti or "Billie Parent," and Mustillo. They searched the premises and found thereon a certain quantity of Canadian beer, seven bottles of gin and three or four bottles of champagne and several bottles of whiskey. During the search, they found a number of "N. S. F." checks on the cash register in said place, having the name of "Frank Gatt" endorsed thereon.

Mr. McFarland, witness for the government and owner of the McFarland Lumber Company of Seattle, who ran a business very near the Lakeview Inn (Tr. 27)), testified that *Frank Gatt* came to his place of business and bought lumber to be delivered to the Lakeview Inn, some time during July or prior thereto, and that he had the lumber delivered and produced the receipt for the lumber, which had Gatt's signature on it as having received the lumber.

The defendant called a witness by the name of James Lochnane, who testified he was the owner of the Lakeview Inn and had leased it in 1922 and 1923 to a man by the name of Valenti and further testified *that he never had any dealings with Frank Gatt except to borrow money from him;* that he

had sold the place some time during the month of April. Upon cross-examination, he testified that he met Valenti at the time this lease was executed for the Lakeview Inn, in a bank on the corner of Fifth Avenue and Jackson Street, in the City of Seattle; that the lease was written in the bank, which bank is next door to the place of business of Frank Gatt; *that Frank Gatt was present at the time the lease was executed to Valenti*, and that *Gatt was the man who produced the lessee* for the *leasing of the premises*, and that Billie Parentti was there at the same time and also testified that he had never seen Valenti from that day to the day of the trial. (Tr. 36.)

ARGUMENT

The only question raised in the defendant's brief is the question in reference to the hearsay testimony, which tended to establish the control of the premises known as the Lakeview Inn. A number of witnesses testified, upon direct examination, that the Gatt brothers controlled these premises and were asked, upon cross-examination, how they knew it. They said that by reason of the fact that people out there told them they did.

Counsel has cited for his authority the case of *Katz v. Commissioner of Immigration*, 245 Fed. p. 316, a decision by this court, in which the court held that you could not prove a crime of accepting the earnings of a prostitute by establishing by hearsay testimony the fact that the defendant owned and controlled the building.

The government also wishes to cite this case for its authority on the above proposition. In this case, there was no other testimony except that of hearsay testimony. In the *Katz* case, the court said:

"These affidavits and protests contain the strongest showing made against Joseph Katz respecting his alleged receiving of the earnings of a prostitute or prostitutes. The very best that can be made out of the testimony, and the whole thereof contained in the record, is that it is WHOLLY hearsay and based upon common repute in the vicinity; the affiants generally ASSEVERATING UPON INFORMATION AND BELIEF. There is PRACTICALLY no SUBSTANTIVE TESTIMONY OF FACT. Locally—that is, in the State of California—the fact that a house is being conducted as a house of ill fame may be shown by common repute; but there is no rule of which we are aware by which the ownership or management of such a house may be so proven. Of course, if it were shown that Joseph Katz was conducting or managing such a house, it would be a reasonable inference and deduction that he was taking the

earnings of the inmates. THERE IS NOT A SYLLABLE OF TESTIMONY THAT HE ACCEPTED SUCH EARNINGS, EXCEPT THAT HE WAS THE OWNER OF THE HOUSE AND ACCEPTED RENTALS FROM THE OCCUPANT, WHICH IN ITSELF, AS WE HAVE SEEN, IS NOT SUFFICIENT TO CONDEMN HIM UNDER THE CHARGE. SOME SUBSTATIVE EVIDENCE OF THE FACT OF MANAGING AND CONDUCTING SUCH A HOUSE, BESIDES MERE HEARSAY AND EXPRESSION OF OPINION AND BELIEF (which is practically the equivalent of NO COMPETENT EVIDENCE OF THE FACT SOUGHT TO BE PROVEN), is necessary UPON WHICH TO BASE THE INFERENCE OF HIS HAVING TAKEN THE EARNINGS OF the inmates."

In the *Katz* case, the court can plainly see that there was no testimony whatever beside that of the hearsay, as plainly set out in the opinion. In this case, there is the lumberman's testimony that he sold Frank Gatt lumber, that it was receipted for by Frank Gatt when it reached the premises, that a number of checks with his name written upon them were found in the cash register, from which it would be a reasonable inference that he had control over the premises, regardless of the hearsay testimony and that the other testimony was offered merely in support thereof. The government contends there was no error in this in view of the other testimony.

In reference to the point brought out in the later part of plaintiff in error's brief, Parentti was not present for trial but was apprehended at the Lakeview Inn. Gatt was asked what the nationality of defendant Parentti was and he testified that he was an Italian. His testimony was offered to show that the defendants were all Italians that were connected with the premises there, Parent's true name being Parentti. It can plainly be seen that the Gatt boys were not prejudiced by the fact that the jurw knew the nationality of the defendant who was not on trial, regardless of what affect it might have had upon the defendant Parentti if he had been present. It assuredly was a circumstance for the jury in the light of the testimony of Lochnane, who testified that Gatt was present at the time the lease was made and also Parentti.

There is plainly no error and the judgment of the lower court should be affirmed.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney.

C. T. McKINNEY,
Assistant United States Attorney.

Attorneys for United States of America.

No. 4693

United States

Circuit Court of Appeals

For the Ninth Circuit.

RUSSELL O. DOUGLASS,

Petitioner and Appellant,

vs.

ROY W. BLAIR, as Trustee in Bankruptcy of the Estate of RUSSELL O. DOUGLASS,

Respondent and Appellee.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the Northern Division of the United States District Court for the Northern District of California, and upon Appeal from Said District Court.

FILED

NOV 20 1925

F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4693

United States

Circuit Court of Appeals

For the Ninth Circuit.

RUSSELL O. DOUGLASS,

Petitioner,

vs.

ROY W. BLAIR, as Trustee in Bankruptcy of the Estate of RUSSELL O. DOUGLASS,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the Northern Division of the United States District Court for the Northern District of California.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Affidavit of Russell O. Douglass.............. 30
Assignment of Errors........................ 41
Bond on Appeal.............................. 44
Certificate of Clerk U. S. District Court to Transcript on Appeal.................... 47
Citation on Appeal 48

EXHIBITS:

Exhibit "A" Attached to Petition for Review of Referee's Order—Affidavit of Russell O. Douglass.................. 18
Exhibit "B" Attached to Petition for Review of Referee's Order—Agreement Dated ——, June, 1924, Between E. A. Pierce, Viola M. Pierce, H. H. Pierce, R. O. Douglass and Bernice Douglass and F. L. McGrew.................. 21
Exhibit "C" Attached to Petition for Review of Referee's Order—Notice of Election in Cause Entitled In the Matter of Russell O. Douglass, a Voluntary Bankrupt 27

Index. Page

Minutes of Court—August 21, 1925—Order Dissolving Restraining Order................ 39
Names and Addresses of Attorneys of Record 11
Notice of Application for Sale of Personal Property 34
Opinion Affirming Referee's Order........... 29
Order Allowing Appeal....................... 43
Order Dissolving Restraining Order.......... 39
Order to Show Cause......................... 38
Petition for Appeal......................... 40
Petition for Review of Referee's Order........ 11
Petition to Review in Matter of Law.......... 1
Praecipe for Transcript of Record............ 46

In the District Court of the United States, in and for the Northern District of California.

IN BANKRUPTCY—No. 1407.

In the Matter of RUSSELL O. DOUGLASS, Bankrupt.

PETITION TO REVISE IN MATTER OF LAW.

To the Honorable, the Judges of the Circuit Court of Appeals of the Ninth Circuit of the United States:

Your petitioner respectfully shows:

That he resides at Folsom, in the county of Sacramento, in the Northern District of California, and is a creditor of Russell O. Douglass, a bankrupt, who was so adjudged by the District Court above entitled, on the 22d day of May, A. D. 1924.

That, after such adjudication, the following proceedings were had in the case of said bankrupt: On the 27th day of June, 1924, the creditors of a partnership firm, of which said bankrupt was a member, by written agreement, and by deed and release, to them made, executed and delivered by said bankrupt, took over the interests of said bankrupt upon the consideration in said agreement stated, to wit: that, said parties creditors would operate the firm business and would pay the claims of the creditors of said firm, and the claims of them, the said contracting creditors.

That thereafter, to wit, on the 12th day of December, 1924, said bankrupt filed a petition in the above-entitled court, praying that he be discharged from all the debts and liabilities, allowed against his estate.

That, thereafter, to wit, on the 27th day of January, 1925, Evan J. Hughes, Esq., Referee in Bankruptcy, ordered the said bankrupt to turn over to Roy W. Blair, all of his individual assets for the benefit of the aforesaid partnership creditors.

That petitioner herein thereupon filed a petition for a review of said Referee's order.

That on or about the 14th day of March, 1925, said petition was presented to the Court, Hon. Judge —— Bourquin, presiding, and upon the matter having been submitted to the court, the order of the Referee was affirmed by said Judge Bourquin, upon the grounds stated in his opinion.

That, thereafter, to wit, on the 14th day of July, 1925, Roy W. Blair, Esq., Trustee in Bankruptcy in said cause, made application to Evan J. Blair, Esq., Referee in Bankruptcy in said cause, for authority to sell the individual property of said bankrupt, to satisfy the claims of the aforesaid partnership creditors.

That, thereafter, to wit, on the 3d day of August, 1925, said application was heard, and same was by said Referee granted, and said Roy W. Blair, Esq., was authorized to sell the stage franchise and equipment of the bankrupt to satisfy the claims of the aforesaid partnership creditors.

That, thereafter, to wit, upon the 4th day of August, 1925, your petitioner, by proper affidavits

regularly prepared and presented to the court on the 5th day of August, 1925, obtained an order to show cause, directed to the said Referee and Trustee in Bankruptcy in said cause, commanding that they show cause before the court why they and each of them should not be restrained and enjoined from proceeding to sell the individual assets of the bankrupt, for the purpose of satisfying the claims of partnership creditors, before having exhausted the assets of the aforesaid partnership.

That said order to show cause came on regularly to be heard before the court on the 18th day of August, 1925, Peter J. Wilkie, Esq., appearing for petitioner, and A. W. Reynolds and H. W. Funke, Esq., appearing for the said Referee and Trustee, aforesaid.

That upon said matter being presented and the Court having heard counsel for the respective parties, the same was submitted for consideration and finding:

That, thereafter, to wit, on the 21st day of August, 1925, the Court made its order and findings in said cause, in the manner following, to wit:

"At a stated term of the Northern Division of the United States District Court, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 21st day of August, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable A. F. ST. SURE, District Judge.

No. 1407.

In re RUSSELL O. DOUGLASS, Bkt.

The order to show cause why an injunction should not be granted restraining Referee and Trustee in Bankruptcy in the above case from selling the personal property of the above-named Bankrupt, heretofore argued and submitted, being now fully considered, it is ORDERED that the order to show cause be denied, restraining order heretofore issued be and the same is hereby dissolved and this cause referred to Evan J. Hughes, Esq., Referee in Bankruptcy, for further proceedings."

That said order was erroneous in matter of law in that:

1. It sets aside the terms and conditions of a written contract entered into between the creditors of a partnership firm not in bankruptcy, and which contract was made by said creditors for the satisfaction of the very claims, for which the sale of the individual property of the bankrupt is now sought.
2. Said order is erroneous in matter of law, in that: It takes the individual assets of the bankrupt, to satisfy partnership claims, which have already been satisfactorily settled.
3. Said order is erroneous in law, in that: It takes from the individual creditor, your petitioner, whose claim is in the sum of $3000.00, together with accrued interest, the property secured to him by law as such individual

creditor, before exhausting the partnership assets.

4. Said order is erroneous in matter of law, in that: It requires no accounting of the partnership business which is a solvent and going concern, and orders the sale of individual assets of a partner in bankruptcy, to pay the claims of partnership creditors, which said creditors themselves had on the 27th day of June, 1924, agreed in writing to pay, satisfy and discharge.

5. Said order is erroneous in matter of law, in that: It sanctions the sale of the individual assets of the bankrupt, for the purpose of paying the claims of a firm of which said bankrupt is not, and never was a member, a new partnership having been formed at the time of the signing of said agreement consisting of the remaining partners of the old firm, and the creditors signing said agreement.

6. Petitioner herein, is the only individual creditor of the bankrupt estate, and has not sought the sale of said individual assets, and no other cause exists for selling same than that heretofore stated.

WHEREFORE, your petitioner, feeling aggrieved because of such order, asks that the same may be revised in matter of law by your Honorable Court, as provided in Section 24b of the Bankruptcy

Law of 1898, and the rules and practice in such case provided.

RUSSELL O. DOUGLASS.
PETER J. WILKIE, Esq.,
Attorney for Petitioner.

State of California,
County of Sacramento,
City of Sacramento,—ss.

I, R. O. Douglass, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information, and belief; and that by transfer to me of the claim of S. N. Douglass, in the sum in the schedule of said bankrupt stated, to wit, $3000.00, I am the only individual creditor of said bankrupt.

RUSSELL O. DOUGLASS.

Subscribed and sworn to before me this 27th day of August, 1925.

[Seal] L. B. KELLER,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: No. 4693. United States Circuit Court of Appeals for the Ninth Circuit. Russell O. Douglass, Petitioner, vs. Roy W. Blair, as Trustee in Bankruptcy of the Estate of Russell O. Douglass, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the Northern Division of the United States District Court for the Northern District of California.

Filed September 21, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4693

United States
Circuit Court of Appeals
For the Ninth Circuit.

RUSSELL O. DOUGLASS,

Appellant,

vs.

ROY W. BLAIR, as Trustee in Bankruptcy of the Estate of RUSSELL O. DOUGLASS,

Appellee.

Transcript of Record.

Upon Appeal from the Northern Division of the United States District Court for the Northern District of California.

In the Matter of RUSSELL O. DOUGLASS, Bankrupt.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

P. J. WILKIE, Nicolaus Bldg., Sacramento, Calif.,
Attorney for Petitioner.

A. B. REYNOLDS, Ochsner Bldg., Sacramento, Calif.,
Attorney for Trustee.

In the District Court of the United States in and for the Northern District of California.

In the Matter of RUSSELL O. DOUGLASS, Bankrupt.

PETITION FOR REVIEW OF REFEREE'S ORDER.

To Evan J. Hughes, Esq., Referee in Bankruptcy:

Your petitioner R. O. Douglass, above named, respectfully shows:

That on the 22d day of May, 1924, your petitioner was adjudicated a voluntary bankrupt, under the provisions of the Bankruptcy Laws of the United States of America.

That said voluntary bankruptcy was occasioned by reason of the matters and things set forth and contained in the affidavit of your petitioner hereto annexed, marked Exhibit "A," referred to herein, and by such reference made a part hereof.

That the schedule of your petitioner on file and of record in the above-entitled cause shows as follows, to wit:

	Liabilities.
On Page 1 thereof, the sum of...........	$ 1395.00
On Page 3 thereof, the sum of............	9180.00
Or the total in the sum of................	$10575.00

All of which were, and are, partnership liabilities for which your petitioner was being held personally liable, and on account of which your petitioner's property was attached by order of the Superior Court of the State of California in and for the County of Sacramento, in the action entitled "The California National Bank of Sacramento (a Corporation) vs. R. O. Douglass and H. H. Pierce. [1*]

That the only individual creditor of your petitioner, as shown by his schedule aforesaid, on page 2 thereof, was one S. N. Douglass, who held a secured claim for the amount and sum of $3,000.00.

That there were no other individual creditors of your petitioner whose claims had not been paid.

That on the —— day of June, 1924, your petitioner herein entered into an express agreement, by and with the creditors of the partnership of Pierce, Pierce, Pierce and Douglass, a copy of which agreement hereto appended, is marked Exhibit "B," referred to herein, and by such reference is made a

*Page-number appearing at foot of page of original certified Transcript of Record.

part hereof, by the terms of which agreement your petitioner transferred, assigned and set over unto one McGrew, all his (petitioner's) right, title, and interest in and to the partnership property set forth and contained on pages 7 and 8 of your petitioner's schedule in bankruptcy, amounting in all to the total sum of $37,750.00, and of which sum your petitioner was the possessor of a full and undivided ¼, one-quarter, interest. In consideration of the following considerations, in said contract contained, and all of which were agreed to by the creditors of said partnership aforesaid, as follows, to wit:

1st. That said F. L. McGrew should dispose of certain property, and retain from the proceeds thereof the sum of $3000.00 for his own personal use.

2d. That said F. L. McGrew should hold and retain, and operate for the benefit of the creditors of said partnership, the lumber interests, land and timber, sawmills, trucks, and all other property, both real and personal, the property of said partnership to the interest of the creditors of said partnership, upon the conditions set forth in said contract [2] hereto appended and marked Exhibit "B."

3d. That the proceeds accruing from the said operating and conducting of said partnership business, should be used: (a) to repay said McGrew, for any moneys expended by him in the operation of said partnership business, and (b) the balance

to be distributed to the general creditors, in liquidation of their respective claims against said partnership, and in payment of attorney's fees, and other necessary costs; and that subsequent to, and after all claims of the creditors of said partnership had been paid, said McGrew would deliver the entire balance of the said partnership property over to one, H. H. Pierce, as sole owner of such property, without recourse by your petitioner or any of the other of said partnership, against said H. H. Pierce.

4th. That said F. L. McGrew was one of the largest creditors of said partnership, and was not at the time of the making of said agreement, a partner or copartner in said partnership business, or otherwise interested therein save as stated.

That on the 27th day of June, 1924, Roy W. Blair, the regularly appointed, qualified and acting trustee of the estate of R. O. Douglass, bankrupt, made and served upon your petitioner the "Notice of Election," a copy of which is hereto appended, marked Exhibit "C," referred to herein, and by such reference made a part hereof. In which, as said trustee, said Roy W. Blair, elected to abandon and surrender all right, title, and interest of the estate of Russell O. Douglass, bankrupt, in and to the partnership interests in said notice described. [3]

That subsequent to the time of the execution of the above and foregoing instruments, the aforesaid F. L. McGrew took possession of the partnership

property hereinbefore mentioned, and operated and conducted same for the benefit of the creditors of said partnership, and disposed of certain of the said partnership assets, and still is in possession and control of the said partnership business under and by virtue of the contract aforesaid.

That on the 27th day of January, 1925, your petitioner appeared for examination before Evan J. Hughes, Esq., Referee in Bankruptcy, in obedience to the order of said Referee, at the office of said Evan J. Hughes, in the Capitol National Bank Building, in the city of Sacramento, State of California.

And over the objection of counsel for your petitioner, Peter J. Wilkie, Esq., who was then and there present, your petitioner was compelled to submit himself to examination in respect to matters pertaining to his estate, though a full examination had formerly been had of your petitioner on the —— day of June, 1924, which examination was not adjourned, or continued, and no formal or other application for this examination was made by any creditor of your petitioner.

That a court reporter was engaged for the purpose of taking down in shorthand the testimony of your petitioner, and said reporter was informed by said Referee, Evan J. Hughes, Esq., aforesaid, that his, said reporter's fees, would be paid out of the estate of your petitioner.

That said Referee aforesaid did also, and then and there, and at the close of said examination,

aforesaid, order your petitioner to turn over to Roy W. Blair, the formerly [4] appointed trustee, in this cause, all of his, petitioner's, individual assets; and did order and command the said Roy W. Blair to take possession of all of the personal and individual assets of your petitioner and dispose of same, for the benefit of the creditors of the former partnership of Pierce, Pierce, Pierce and Douglass.

That such order was and is erroneous for the following reasons, to wit:

1st. By reason of the fact that a dissolution of the said partnership was created at the time of the execution of said agreement hereto appended and marked Exhibit "B," your petitioner was no longer a member of said partnership and had not been for more than seven months immediately preceding the date of the examination heretofore referred to.

2d. That said partnership business is now being, and ever since the time of the execution of said contract marked Exhibit "B" hereto appended, has been conducted by the creditors under the terms of said contract.

3d. That there are no individual creditors of your petitioner whose claims have not been paid by your petitioner, and no claims presented by his individual creditors, which at this time remain unpaid.

4th. That upon the execution of the contract, marked Exhibit "B" hereto appended, the said Roy W. Blair, Trustee in Bankruptcy, should have

been discharged, there being no individual creditors of your petitioner whose claim were unsatisfied.

That the order of said Referee, Evan J. Hughes, aforesaid, commanding said Roy W. Blair, said trustee, aforesaid, to pay the fees of the stenographic reporter, as aforesaid, was and is erroneous in this, that said examination was not had, and said [5] testimony was not called for, or taken by reason of the application of any creditor of your petitioner, for such examination, and was unauthorized, irregular and unjustified.

That the agreement, a copy of which marked Exhibit "B," is appended hereto, should and ought to have been confirmed by the Hon. Judge of the Court in which this matter is pending, and such confirmation has never been sought by any of the contrasting parties.

WHEREFORE your petitioner feeling aggrieved because of the orders of Evan J. Hughes, Esq., said Referee aforesaid, as hereinbefore set forth, prays that the same may be reviewed, as provided in the bankruptcy law of 1898, and General Order XXVII.

That the agreement, hereinabove referred to, be confirmed by the Hon. Judge of the aforesaid District Court, and such other relief granted your petitioner as justice and equity will permit.

Dated January 30th, 1925.

RUSSELL O. DOUGLASS,
Petitioner.

State of California,
County of Sacramento,
City of Sacramento,—ss.

I, R. O. Douglass, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information and belief.

RUSSELL O. DOUGLASS.

Subscribed and sworn to before me this 30th day of January, 1925.

[Seal] EDITH L. RUGGLES,
Notary Public in and for the County of Sacramento,
State of California. [6]

EXHIBIT "A."

State of California,
County of Sacramento,—ss.

Russell O. Douglass, being first duly sworn, deposes and says, as follows, to wit:

That he is the petitioner in the foregoing petition named, that, on the 19th day of May, 1924, an action was brought against him in the Superior Court of the State of California, in and for the County of Sacramento, entitled "The California National Bank (a Corporation) vs. R. O. Douglass and H. H. Pierce"; that said action was brought to recover certain moneys loaned by said Bank to the partnership of Pierce, Pierce, Pierce and Douglass, and that the individual property of affiant was taken

under the Writ of Attachment issuing in said cause; that another suit was brought against affiant in the Justice's Court of Sacramento, Township, County of Sacramento, California, for a claim against said partnership aforesaid, and that certain other creditors of said partnership whose names affiant does not remember had threatened to bring suit against affiant; that thereupon, and in order to avoid extended litigation and a multiplicty of suits against him, affiant herein filed his schedule in bankruptcy and applied himself to the judgment of the court in bankruptcy, for an adjudication of the various claims.

That subsequent to the time of affiant's being adjudicated a bankrupt, several meetings were called by the creditors of the partnership, at which meetings a majority of the creditors were present, and certain propositions were submitted by said creditors, with the object of liquidating the liabilities of said partnership; that, upon consideration of the promise of the California National Bank, creditor, to accept a [7] short time promissory note from one, F. L. McGrew, also a creditor, in satisfaction of its claim against affiant and H. H. Pierce, a partner, which promissory note was duly made by said F. L. McGrew in favor of said Bank and delivered to said Bank, as affiant has been informed, and upon information and belief alleges, and in consideration of the other promises and agreements set forth and contained in that contract marked Exhibit "B" hereto appended, your petitioner, affiant herein,

transferred, assigned, and set over unto the said F. L. McGrew all his, affiant's, right, title and interest in and to the said partnership assets and in and to the said partnership business.

That said partnership assets, and said partnership business, was thereupon taken over, by said F. L. McGrew, and was conducted, carried on and operated, and is still being conducted, carried on and operated by said F. L. McGrew, for the benefit of the creditors of said partnership.

That the assets of the estate of your petitioner, affiant, herein, consist, principally, of a passenger stage business, and equipment, that, if the order of the Referee in bankruptcy is allowed to stand, affiant will be compelled to discontinue the operation of said stage business, and the certificate of public convenience and necessity to him granted by the Railroad Commission of the State of California will be jeopardized, if not utterly lost, to the estate of affiant, and further affiant saith not.

RUSSELL O. DOUGLASS,
Affiant.

Subscribed and sworn to before me this 30th day of January, 1925.

[Seal] EDITH L. RUGGLES,
Notary Public in and for the County of Sacramento, State of California. [8]

EXHIBIT "B."

THIS AGREEMENT made and entered into this —— day of June, 1924, by and between E. A. Pierce, Viola M. Pierce, H. H. Pierce, R. O. Douglass and Bernice Douglass, hereinafter referred to as debtors, and F. L. McGrew, hereinafter referred to as trustee, and the several persons, companies and firms whose names are hereunto signed respectively, being creditors of said debtors, and all other creditors of said debtors acceding thereto, hereinafter called Creditors,

WITNESSETH:

THAT WHEREAS said persons herein referred to as debtors have in various capacities been engaged in the business of operating a sawmill and conducting a retail lumber-yard, and have contracted obligations, indebtednesses and liabilities to various persons and parties;

AND WHEREAS, the said R. O. Douglass, as an individual, has heretofore filed a voluntary petition in bankruptcy, and a trustee has been duly appointed and is in charge of his estate;

AND WHEREAS, it appearing that the assets used by such debtors in the conducting of said sawmill and lumber business are encumbered by mortgage so that at this time the equity therein would be of practically no value unless such mill can be operated, and it being the desire of all parties hereto that such business shall be continued under a

trusteeship as hereinafter more specifically set forth,—

NOW, THEREFORE, it is agreed that the parties herein referred to as debtors shall execute to the said F. L. McGrew a deed to the said property heretofore used in the conducting of such business; that the said F. L. McGrew, as an individual, shall have the right to dispose of the North Sacramento property, and any sum received in excess of Three Thousand Dollars shall go into the trustee's fund,—the first three thousand dollars, however, [9] shall be retained by him and credit given him on mortgages covering said property.

AND IT IS AGREED THAT WHEREAS the said F. L. McGrew now has certain mortgage interests in and to the El Dorado County property, and that he will not dispose, sell, assign or in any way encumber the same during this trustee agreement but retain the same, except as herein otherwise agreed as a security to the creditors for the faithful accounting of all funds coming into his possession by virtue of the operation of such sawmill, as such trustee as hereinafter set forth.

That the said F. L. McGrew agrees as such trustee that he will to the best of his ability and knowledge, operate, handle and deal in the assets of said sawmill and apply the net proceeds as hereinafter mentioned toward the extinguishing of the obligations as hereinafter more specifically set forth, and to take care of, mortgage, handle, operate, dispose, sell, hypothecate or in any manner deal with and in

any of the personal property for the purposes herein set forth.

The trustee agrees to advance for the undersigned creditors such amount as is necessary for the initial expenses in commencing operations of the sawmill, and that he will also take care of the account now due the California National Bank of Sacramento, California, being approximately the sum of $1250.00, and that such sums shall be repaid to said F. L. McGrew as an individual as hereinafter set forth.

IT IS AGREED THAT WHEREAS the said trustee, as an individual, has a mortgage interest in the real property used for the operation of said sawmill, and C. D. Le Master, whose name is hereto subscribed as a creditor, has a mortgage interest on such timber, that the said trustee shall pay to himself as an individual the sum of One Dollar on each thousand feet stumpage and to the said C. D. Le Master the sum of Fifty Cents on each [10] thousand feet stumpage. It being understood that said amount shall be considered as an equity in arriving at the amount of depreciation of the mortgage security.

The said F. L. McGrew agrees as such trustee that he will conduct and operate the said sawmill and dispose of the manufactured product and will otherwise handle and dispose of the assets to the best of his judgment and will keep accurate account of all monies advanced and expended, and such records shall at all times be open for the inspection of all parties herein concerned.

IT IS AGREED that the proceeds received from the sale of lumber or other assets which may accumulate shall be applied in manner following:

First: The general operating expenses including the purchase price of such material as may be necessary shall first be paid; then such fund or funds as may have been advanced by the trustee shall be repaid to him, and all labor claims which have accumulated and are a priority at law, shall be paid; also the sum of Two Hundred Fifty and no/100 Dollars ($250.00), on account of trustee's fees in handling such property, following the payment of which the said trustee shall use the assets accumulated from time to time to be distributed to the general creditors at such time as may hereafter be agreed upon by such trustee and the creditors' committee as hereinafter named.

It is agreed that the said C. D. Le Master and Curtis H. Cutter, two of the subscribing creditors, shall advance the trustee as to payments of obligations, and with him shall determine priority of payments of various claims and the general distribution of assets which may accumulate. It being agreed that the schedule hereinafter set forth shall apply, providing there are no extenuating circumstances involving other creditors, [11] and that said trustee and committee shall use their best judgment in taking care of such obligations as will work to the best interest of all concerned.

It is agreed that the remainder of the trustee's fee of $750.00 shall be considered as a claim of general creditor and be entitled to receive payment on dis-

tribution of the assets; said trustee's fee herein agreed to be paid are for the purpose of defraying the expenses of attorney's fees and assistance in keeping a general account of the operations of said mill during the said trusteeship.

Following the payment of the obligations to the general creditors and other payments as herein stated, it is agreed that should trustee employ H. H. Pierce to run, conduct and operate such sawmill for him, that he should conduct such operations in such a satisfactory manner, then the said trustee agrees upon the said payments being made and obligations being terminated that he will transfer all of the assets received by him by virtue of this trusteeship to said H. H. Pierce, and the other parties herein named debtors agree that they will at such time, sign such instruments, deeds or other papers transferring the full interest to the said H. H. Pierce as his own, and for his individual use and benefit.

It is also agreed that the said C. D. Le Master for the purpose of this agreement waives the right of his security in such mill property and lumber which has now been accumulated, and agrees to participate as a general creditor except that in view of the fact that the said C. D. Le Master on account of having taken legal action has heretofore rendered valuable assistance to all of the creditors by preserving such property for all creditors, that when sufficient funds have accumulated, that in the judgment of the trustee and such committee it is [12] practical to recompense him for reasonable attorney's fees, that

they shall at their option reimburse him for such fund.

The parties herein referred to as debtors do by these presents, sell, assign, transfer and set over to the said F. L. McGrew, as such trustee, all the personal property, and all right, title and interest in and to such property as heretofore used by them in the conducting of such lumber business, to use for the purposes as hereinbefore set forth.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year in this agreement first above written.

E. A. PIERCE,
VIOLA M. PIERCE,
R. O. DOUGLASS,
BERNICE DOUGLASS,
H. H. PIERCE,
Debtors.
F. L. McGREW,
Trustee.
C. D. LE MASTERS. [13]

EXHIBIT "C."

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of RUSSELL O. DOUGLASS, a Voluntary Bankrupt.

NOTICE OF ELECTION.

To Viola M. Pierce, F. L. McGrew, Horace H. Pierce, A. B. Kesler, and Any Other Interested Parties:

You, and each of you, are hereby notified that the undersigned, Roy W. Blair, Trustee in the matter of the bankruptcy of Russell O. Douglass, bankrupt above named, does hereby elect to abandon and surrender all right, title and interest of the Estate of Russell O. Douglass, a bankrupt, in and to the following real property, situate, lying and being in the County of Sacramento, State of California, described as follows, to wit:

The West 45 feet of the Southerly 150 feet of Lot Three in Block 45 of North Sacramento, Subdivision No. 1.

Said Trustee does also hereby elect to abandon and surrender all right, title and interest of the Estate of Russell O. Douglass, a bankrupt, in and to the following real property, situate, lying and being in the County of El Dorado, State of California, described as follows, to wit:

W.½ of SE.¼; SE.¼ of SW.¼ of sec. 29; NW.¼ of NE.¼ of sec. 32, all in Tp. 10 N., R. 13, R. N.½

of SW.¼ of sec. 28; E.½ of SE.¼ of sec. 29 in Tp. 10 N., R. 13 E., M. D. B. & M.

Said Trustee does also hereby elect to abandon and surrender all right, title and interest of the Estate of said Russell O. Douglass, a bankrupt, in and to all property and assets belonging to the copartnership of Douglass & Pierce Lumber Company, said property and assets consisting of a certain sawmill, together with the machinery and equipment used in connection therewith located on the real property hereinbefore described; also one Packard Five Ton Truck.

This election by said Trustee to abandon and surrender all right, title and interest of the Estate of said Russell O. Douglass, a [14] bankrupt, in and to the above-described property, is made for the following reasons:

That the indebtedness owed by said copartnership of Douglass & Pierce Lumber Company amounts to more than the assets belonging to said copartnership, and that to attempt to claim any interest in behalf of the Estate of Russell O. Douglass, a bankrupt, in and to said property hereinbefore set forth, belonging to said copartnership of Douglass & Pierce Lumber Company, would be onerous and unprofitable to the Estate of Russell O. Douglass, a bankrupt, and would burden instead of benefiting said Estate.

Said Trustee does not abandon and surrender the right, title and interest of the Estate of said Russell

O. Douglass, a bankrupt, in and to one Five Ton White Truck.

Dated: June 27th, 1924.

——————————,
Trustee.

[Endorsed]: Filed February 2, 1925. Evan J. Hughes, Referee in Bankruptcy.

[Endorsed]: Filed at 10 o'clock and — min. A. M. Feb. 13, 1925. [15]

United States District Court, California.

No. 1407.

In re DOUGLASS.

OPINION AFFIRMING REFEREE'S ORDER.

Review of the referee's order is denied, and order affirmed. On review, nothing can be considered save the evidence by the referee certified. On that, his order to deliver the bankrupt's property to the trustee is right. So is it, if could be considered the matters presented first in the bankrupt's petition. As to that, he virtually claims his bankruptcy is but pretended, and strategy to hinder and delay creditors—was in bad faith! Although this might afford ground for inquiry anent his abuse of the equity powers of the court, it can avail him nothing to avoid his duty to deliver up his property,—so long as the adjudication of bankruptcy stands.

BOURQUIN, J.

Mar. 23, 1925.

[Endorsed]: Filed March 23, 1925. [16]

In the District Court of the United States in and for the Northern District of California.

No. 1407.

In the Matter of RUSSELL O. DOUGLASS, Bankrupt.

AFFIDAVIT OF RUSSELL O. DOUGLASS.

State of California,
County of Sacramento,—ss.

Russell O. Douglass, being first duly sworn, deposes and says that he is the petitioner in the above-entitled cause, named.

That on the 22d day of May, 1924, as such petitioner, he was adjudicated a voluntary bankrupt; that said voluntary bankruptcy was occasioned by reason of the matters and things set forth and contained in his petition for Review of Referee's order, on file and of record with the papers and records in said cause, in the above-entitled court.

That the records and papers in said cause will show that petitioner was forced into bankruptcy by the action of creditors of a copartnership, of which petitioner was a member, to wit; the copartnership of Pierce, Pierce and Douglass;

That on the —— day of June, 1924, subsequent to the date of the aforesaid adjudication of your petitioner as a bankrupt, as aforesaid, certain persons, to wit, F. L. McGrew, C. D. Le Master and Curtis H. Cutter, principal creditors of the aforesaid copartnership, entered into a written agreement with

affiant, your petitioner, wherein and whereby the said creditors agreed to pay, satisfy and discharge all of the debts, claims and liabilities of the said copartnership, in consideration of the agreement of affiant, to turn over to said persons, by deed and by release, all of his, affiant's, right, title and interest in and to the said copartnership property and assets.

That affiant, by deed and by release to them, the said persons [17] aforesaid, did turn over to the said persons all of his right, title and interest in and to the said copartnership property and assets, and said persons did on or about the said 27th day of June, 1924, take possession of the same, and have ever since said time carried on, conducted and operated, and are now carrying on, conducting and operating the said business, and have paid off a large amount of the said copartnership debts and liabilities, the total sum of which is unknown to your petitioner, and all of which appears on file and of record among the papers and records in this cause.

That on the 27th day of June, 1924, Roy W. Blair, Esq., the Trustee in Bankruptcy appointed in this cause, who was a party to, and had been fully advised and informed of all these matters, filed a Notice of Election with the Clerk of the above-entitled court, waiving his right as such trustee to proceed against the said partnership property, which Notice of Election is also on file and of record among the papers and records on file in this cause.

That thereafter, to wit, on the 12th day of December, 1924, affiant filed a petition in the above-en-

titled court, praying that he be discharged from all the debts and liabilities of said copartnership.

That thereafter, to wit, on the 27th day of January, 1925, Evan J. Hughes, Esq., Referee in Bankruptcy, after due notice to affiant, held an examination of affiant in the office of said referee, at Sacramento, California, and ordered and commanded affiant, that he, affiant, should turn over all his assets to said Roy W. Blair, Trustee aforesaid, for the benefit of the partnership creditors aforesaid; that your petitioner, through his attorney, Peter J. Wilkie, Esq., resisted said order, and petitioned for a writ of review of said order, setting forth in his said petition all the matters and things hereinabove set forth, and alleging therein [18] that the petitioner had no individual liabilities which he was not able to pay, and that all of his individual liabilities had been paid, satisfied and discharged; that on the 14th day of March thereafter, or thereabouts, said matter was heard before the Court, Hon. Bourquin presiding; that said Judge Bourquin, in a written opinion stated that for affiant to file a petition in bankruptcy, and then later come into court and state that he had no debts or liabilities which he was unable to pay, was evidence to the Court that his filing of said petition in bankruptcy had been done for the purpose of delaying and defrauding his creditors, and said Judge Bourquin affirmed the order of said Referee, commanding petitioner to turn over to the Trustee in Bankruptcy, all of the petitioner's said assets.

That the assets of petitioner consist of a stage line for the transportation of passengers between Sacramento and Folsom, in the county of Sacramento, California.

That thereafter, and on the 24th day of March, 1925, your petitioner filed with the said Evan J. Hughes, Referee aforesaid, a motion for confirmation of the agreement between your petitioner and the creditors of the aforesaid copartnership, to wit, Pierce, Pierce and Douglass, setting forth therein said agreement in full and praying for a dismissal of the petition in bankruptcy and in accordance with the rules of procedure of this court.

That said Referee refused to, and would not, and did not forward the same to this court as by law provided, nor to the Clerk of the said court, according to the rules of said court, or whatsoever or at all; that on or about the 22d day of May, 1925, said Referee informed petitioner that if he would agree to pay the costs in said cause to date, and would allege in his motion for dismissal that all of the debts and liabilities of the bankrupt had been paid, filing another motion containing merely these [19] allegations, that he, said Referee, would forward the same to the Court for hearing and disposition; that your petitioner did file with said Referee another motion in accordance with the request of said Referee on the 23d day of May, 1925; that said Referee refused to, and would not, and did not forward the same to the court, or to the Clerk of said court, as by rule of this court provided or whatsoever or at all.

That thereafter, to wit, on the 14th day of July, 1925, said Referee in Bankruptcy caused the following notice to be made and mailed to petitioner, and to the creditors of said copartnership, to wit:

In the District Court of the United States, in and for the Northern District of California.

No. 1407.

In the Matter of RUSSELL O. DOUGLASS, Bankrupt.

NOTICE OF APPLICATION FOR SALE OF PERSONAL PROPERTY.

To the Creditors of the Above-named Bankrupt:

Notice is hereby given that the trustee in the above bankruptcy matter has filed an application for authority to sell certain personal property consisting of the franchise of the automobile stage line between Sacramento and Folsom in Sacramento County, together with the automobiles and equipment used by the bankrupt in connection with said stage line, and you are further notified that a meeting of creditors will be held at the office of Evan J. Hughes, Referee in Bankruptcy, at Room 614, Capital National Bank Building, Sacramento, California, on the 3d day of August, 1925, at 11 o'clock A. M., at which time said application will be heard.

Dated: July 14th, 1925.

EVAN J. HUGHES,
Referee in Bankruptcy.

That in accordance with the information given in the above notice, and on the 3d day of August, 1925, a meeting was held in the said office of the Referee, aforesaid, at which meeting there appeared the following persons, and no others, to wit: A. B. Reynolds, Esq., W. H. Funk, Esq., Wm. Sitton, Esq., and Peter J. Wilkie, Esq., counselor for petitioner Douglass.

That upon the Referee, aforesaid, Evan J. Hughes, Esq., passing upon the application for authority to sell the personal property [20] aforesaid, Peter J. Wilkie, Esq., councelor for petitioner, made objection, and resisted the granting of said application, on the grounds following, to wit:

1st. That there were no individual liabilities, and no individual creditors, whose claims had not been settled, that the application was made on behalf of the partnership creditors, and that the partnership assets had not been exhausted, and no attempt had been made to dispose of them.

2d. That an agreement had been entered into between Russell O. Douglass and the creditors of the partnership, whereby certain of said creditors had agreed in writing to pay off all of the said partnership liabilities on consideration of the transfer to them of all of the interests of the said Douglass, that said creditors had obtained said transfer of the said interests of petitioner, and were now in possession of said property, were operating, and had been operating said partnership business, and had paid certain of the liabilities of said partnership, and had released petitioner from liability on

the partnership debts, by the execution of the said agreement.

That, after hearing the argument of counsel for petitioner Douglass, the Referee made an order granting the application of the trustee, and authorizing said Trustee to sell the aforesaid personal property of petitioner Douglass.

That if such sale is made your petitioner will be irreparably injured, and his stage business will be lost to him without opportunity to be heard by the Court, in respect to the agreement and settlement of petitioner's debts and liabilities, as hereinbefore stated.

That no injury can be suffered by the creditors or alleged creditors of the partnership, or of petitioner in the above-entitled cause, and that your petitioner will be greatly damaged and [21] injured, if this sale is permitted, or if his said franchise is sold, as proposed by said trustee.

WHEREFORE, your petitioner prays the Court for an order to show cause, directed to Evan J. Hughes, Esq., Referee in Bankruptcy, and to Roy W. Blair, Esq., Trustee in Bankruptcy, in the above-entitled cause, commanding them, and each of them, that they show cause before the Court why an order should not be granted restraining them from selling the personal property of the petitioner, and for such other and further relief as may be just.

RUSSELL O. DOUGLASS,
Affiant.

Subscribed and sworn to before me this 4th day of August, 1925.

[Seal] C. W. BAKER,

Notary Public, in and for the County of Sacramento, State of California.

State of California,
County of Sacramento,—ss.

Peter J. Wilkie, Esq., being first duly sworn, deposes and says, as follows: I am the attorney and counsel of record for the petitioner Douglass, in the above-entitled matter, and am familiar with all the matters and things in the above and foregoing affidavit contained, and I believe such matters to be therein truly stated, and such affidavit to be true.

PETER J. WILKIE.

Subscribed and sworn to before me this 4th day of August, 1925.

[Seal] C. W. BAKER,

Notary Public, in and for the County of Sacramento, State of California.

[Endorsed]: Filed at 2 o'clock P. M. Aug. 5, 1925. [22]

In the District Court of the United States in and for the Northern District of California.

No. 1407.

In the Matter of RUSSELL O. DOUGLASS, Bankrupt.

ORDER TO SHOW CAUSE.

On the affidavit of the above-named Russell O. Douglass, and the supporting affidavit of his counsel, Peter J. Wilkie, Esq., copies of which are hereto attached, and upon all the papers and records filed with the Referee and Clerk of the court, in the above-entitled matter:

IT IS ORDERED, that you, the said Evan J. Hughes, Esq., Referee in Bankruptcy, and you, the said Roy W. Blair, Esq., Trustee in Bankruptcy, in the above-entitled cause, show cause before this court, at San Francisco, in the Northern District of California, in the United States Postoffice Building, in said city, located on the corner of Seventh Street and Mission Street therein, on the 18th day of August, 1925, at the hour of 10 o'clock A. M., why an injunction should not be granted, restraining you and each of you from selling the personal property of the above-named bankrupt, consisting of an auto-stage line between Sacramento and Folsom cities and the franchise and equipment thereof, and for such other and further relief as may be just.

AND IT IS FURTHER ORDERED that you and each of you, your agents and servants, be in the meantime restrained, and you are hereby forbidden to sell or to offer the said property for sale until the further order of this court.

Dated at San Francisco, California, this 5th day of August, 1925.

A. F. ST. SURE,
Judge of the Said District Court.

[Endorsed]: Filed at 2 o'clock P. M. Aug. 5, 1925. [23]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 21st day of August, in the year of our Lord one thousand nine hundred and twenty-five. Present: the Honorable A. F. ST. SURE, District Judge.

No. 1407.

In re RUSSELL O. DOUGLASS, Bkt.

MINUTES OF COURT—AUGUST 21, 1925—ORDER DISSOLVING RESTRAINING ORDER.

The order to show cause why an injunction should not be granted restraining Referee and Trustee in Bankruptcy in the above case from selling the personal property of the above-named bankrupt, hereto-

fore argued and submitted, being now fully considered, IT IS ORDERED that the order to show cause be denied, restraining order heretofore issued be and the same is hereby dissolved, and this cause referred to Evan J. Hughes, Esq., Referee in Bankruptcy, for further proceedings. [24]

In the District Court of the United States in and for the Northern District of California.

No. 1407.

In the Matter of RUSSELL O. DOUGLASS, Bankrupt.

PETITION FOR APPEAL.

To the Honorable WM. H. HUNT, United States Circuit Judge:

Comes now R. O. Douglass, individual creditor of the estate of the above-named bankrupt, feeling himself aggrieved by the order of this Court and made and entered on the 21st day of August, 1925, and hereby appeals from said order, denying the order to show cause, and dissolving the preliminary injunction and restraining order, heretofore issued, and referring said cause to Evan J. Hughes, Esq., Referee in Bankruptcy, for further proceedings, for the reasons specified in the assignment of errors filed herein, and prays that this appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order is based, duly authenticated,

may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in the State of California.

Dated this 28th day of August, 1925.

PETER J. WILKIE, Esq.,
Attorney for R. O. Douglass. [25]

In the District Court of the United States in and for the Northern District of California.

No. 1407.

In the Matter of RUSSELL O. DOUGLASS, Bankrupt.

ASSIGNMENT OF ERRORS.

Comes now R. O. Douglass, and says that in the order made and entered in the above-entitled proceeding on the 21st day of August, 1925, there is manifest error, and files the following assignment of errors committed and happening in the said proceeding, upon which he will rely in his appeal from said order:

I.

In affirming the order of the Referee.

II.

In denying the order to show cause.

III.

In dissolving the preliminary injunction and restraining order issued and directed to the Referee and Trustee.

IV.

In ignoring the terms of a written agreement, made between the creditors of a solvent partnership, and a bankrupt partner for the settlement of firm debts.

V.

In authorizing the Referee and Trustee to sell the individual assets of the bankrupt, to apply on the liquidation of claims of said partnership, after 12 months' operation of the partnership business by a new firm, without an or any accounting from said partnership business. [26]

VI.

In authorizing the Referee and Trustee to sell the individual assets of the bankrupt to apply on the liquidation of partnership claims without and before having exhausted the assets of said partnership.

VII.

In failing and refusing to order all partnership creditors, to apply to the firm assets, for satisfaction of firm debts, until said firm assets were exhausted.

VIII.

In failing and refusing to order the Referee and Trustee to protect the individual assets of the bankrupt for the benefit of individual creditors.

IX.

In ordering the interest of this claimant in the individual assets of the bankrupt to be subject to the claim of partnership creditors.

X.

In failing and refusing to recognize the new partnership created by the solvent partners of the old firm, of which the bankrupt was a member, and those creditors who took over the partnership interests of the bankrupt upon a promise to satisfy and discharge the liabilities of the said partnership.

XI.

In authorizing the Referee and Trustee to sell the individual assets of the bankrupt, to apply on the liquidation of the debts of a solvent and going firm.

Dated this 28th day of August, 1925.

PETER J. WILKIE, Esq.,
Attorney for R. O. Douglass.

[Endorsed]: Filed Aug. 28, 1925. [27]

In the District Court of the United States in and for the Northern District of California.

No. 1407.

In the Matter of RUSSELL O. DOUGLASS, Bankrupt.

ORDER ALLOWING APPEAL.

The foregoing petition of R. O. Douglass for an appeal from that certain order, made and entered in the above-entitled proceedings in bankruptcy on the 21st day of August, 1925, to the United States Circuit Court of Appeals for the Ninth Circuit, is hereby granted, and allowed, and the appeal bond is hereby fixed at Two Hundred and Fifty Dollars

($250.00), and upon the approval and filing of the said bond all further proceedings in the above matter will be suspended until after the hearing and determination of the appeal.

Dated this 28th day of August, 1925.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: Filed Aug. 28, 1925. [28]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Russell O. Douglass, as principal, and Eagle Indemnity Company, a corporation organized under the laws of the State of New York, and authorized to transact business under the laws of the State of California, as sureties, are held and firmly bound unto Roy W. Blair, Trustee in Bankruptcy, in the full and just sum of Two Hundred Fifty and No/100ths dollars, to be paid to the said Roy W. Blair, ——— certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of August, in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California, in a matter depending in said court, between

Russell O. Douglass and said Roy W. Blair, as Trustee, and an order was made against the said Russell O. Douglass, and the said Russell O. Douglass, having obtained from said Court an order to reverse the order in the aforesaid matter and a citation directed to the said Roy W. Blair, citing and admonishing him to be and appear at a United States Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California upon a time hereinafter to be noticed:

Now, the condition of the above obligation is such, That if the said Russell O. Douglass shall prosecute said order to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

RUSSELL O. DOUGLASS. (Seal)
[Seal] EAGLE INDEMNITY COMPANY,
By H. J. THIELEN, (Seal)
Attorney-in-Fact.

Acknowledged before me the day and year first above written.

[Seal] ————————.

State of California,
County of Sacramento,—ss.

On this 31st day of August, 1925, before me, E. P. Gascoigne, a Notary Public in and for said Sacramento County, residing therein duly commissioned and sworn, personally appeared H. J. Thielen, known to me to be the person whose name is subscribed to the within instrument as the at-

torney in fact of Eagle Indemnity Company, and the said H. J. Thielen, acknowledged to me that he subscribed the name of Eagle Indemnity Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at my office in the County of Sacramento the day and year in this certificate first above written.

[Seal] E. P. GASCOIGNE,

Notary Public in and for said Sacramento County, State of California.

Approved:

W. H. HUNT,
Circuit Judge. [29]

In the District Court of the United States in and for the Northern District of California.

No. 1407.

In the Matter of RUSSELL O. DOUGLASS, Bankrupt.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States for the Northern District of California:

You are hereby requested, in preparing your return to the citation on appeal in the above-entitled cause, to include the following:

1. Motion to review Referee's order.

2. Opinion of Judge affirming Referee's order.
3. Order of Referee authorizing Trustee to sell individual assets of bankrupt.
4. Affidavit and petition for order to show cause.
5. Order of the District Judge appealed from.
6. Petition for appeal.
7. Order allowing appeal.
8. Assignment of errors.
9. Citation on appeal.
10. Praecipe for transcript of record, which comprises all papers, records or other proceedings than those above mentioned which are necessary to be included by the Clerk of said court in making up his return to said citation as a part of such record.
11. Bond on appeal.

PETER J. WILKIE, Esq.,
Attorney for R. O. Douglass. [30]

Personal service on me of copies of the petition for appeal, order, assignment of errors, and praecipe for transcript of record, in the within matter is hereby admitted, this 29th day of August, 1925.

A. B. REYNOLDS,
Attorney for Trustee.

[Endorsed]: Filed at 11 o'clock A. M., Aug. 29, 1925. [31]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of Cali-

fornia, do hereby certify that the foregoing 32 pages, numbered from 1 to 32, inclusive, contain a full, true and correct transcript of certain records and proceedings in the Matter of Russell O. Douglass, Bankrupt, No. 1407, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein).

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Five and 00/100 ($5.00) Dollars, and that the same has been paid to me by the attorney for petitioner herein.

Annexed hereto is the original citation on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court, this 18th day of September, A. D. 1925.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [32]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Roy W. Blair, as Trustee in Bankruptcy of the Estate of Russell O. Douglass, and to A. B. Reynolds, Esq., Attorney for said Trustee in Bankruptcy, GREETING:

You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the Northern Division of the United States District Court for the Northern District of California, entitled In the Matter of Russell O. Douglass, Bankrupt, No. 1407 and wherein Russell O. Douglass, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. H. HUNT, United States Circuit Judge for the United States Circuit Court of Appeals for the Ninth Circuit, this 28th day of August, A. D. 1925.

W. H. HUNT,
United States Circuit Judge.

United States of America,—ss.

On this 29th day of August, in the year of our Lord one thousand nine hundred and twenty-five, personally appeared before me, Peter J. Wilkie, Esq., the subscriber to this certificate, and makes oath that he delivered a true copy of the within citation to A. B. Reynolds, Esq., Attorney for the Trustee in the within entitled citation named.

PETER J. WILKIE, Esq.

Subscribed and sworn to before me at Sacramento, this 29th day of August, A. D. 1925.

[Seal] C. W. BAKER,

Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed at 11 o'clock and — min. A. M., Aug. 29, 1925. [33]

[Endorsed]: No. 4693. United States Circuit Court of Appeals for the Ninth Circuit. Russell O. Douglass, Appellant, vs. Roy W. Blair, as Trustee in Bankruptcy of the Estate of Russell O. Douglass, Appellee. Transcript of Record. Upon Appeal from the Northern Division of the United States District Court for the Northern District of California.

Filed September 21, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

5 **No. 4693**

IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

IN THE MATTER OF
RUSSELL O. DOUGLASS,
Bankrupt,

RUSSELL O. DOUGLASS,
Petitioner,

vs.

ROY W. BLAIR, as Trustee in Bankruptcy of the Estate of Russell O. Douglass,
Respondent.

Brief For Petitioner and Claimant

FILED
JAN

P. J. WILKIE,
304 Nicolaus Building, Sacramento,
Attorney for Petitioner and Claimant.

No. 4693

IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

IN THE MATTER OF
RUSSELL O. DOUGLASS,
Bankrupt,

RUSSELL O. DOUGLASS,
Petitioner,

vs.

ROY W. BLAIR, as Trustee in Bankruptcy of the Estate of Russell O. Douglass,
Respondent.

BRIEF FOR PETITIONER AND CLAIMANT.

STATEMENT OF THE CASE.

Claimant, Russell O. Douglass, is now, and at the time of the filing of his petition in Bankruptcy, to-wit: May 22nd, 1924, was engaged

in the business of operating a passenger stage line between the Town of Folsom and the City of Sacramento, which business was and is his individual business and property. In addition to this, claimant was the owner of an equal one-third interest in the partnership business and firm known as Pierce, Pierce and Douglass; the said partnership being the owners of extensive timber lands in El Dorado County, together with saw-mills and other real and personal property all of the value of $37,750.00. (Tr., p. 13.)

On the 19th day of May, 1924, certain of the partnership-creditors, whose claims constituted an individual and a partnership liability, to-wit: Promissory notes signed by the partners, as partners and as indivduals, for money used in the firm business, brought suit and attached the business and property of claimant. (Tr., pp. 18-19.)

Claimant, then, in order to protect his individual business and creditors, to minimize the cost and obtain an adjudication of these matters in one proceeding, sought the aid of the Bankruptcy Court and an adjudication on his petition was made by said court on the 22nd day of May, 1924. (Tr., p. 11.)

The remaining partners refused to join in

the petition in bankruptcy, refused to file a petition in bankruptcy on behalf of the firm, and did not and would not, consent to have said firm declared bankrupt.

Subsequent to the date of said adjudication, aforesaid, several meetings of the creditors were called (Tr., p. 19) and a trustee was appointed to take charge of the estate of claimant, to-wit: Roy W. Blair, Respondent herein, who was personally present and represented by his counsel on all occasions. The only individual creditor of claimant and petitioner Douglass, was one S. N. Douglass, a brother of claimant, who held a secured claim in the sum of $3000.00 (Tr., p. 12) and claimant, by his counsel, upheld his right under Section 2405 of the Civil Code of the State of California, to require application of the partnership property to the payment of its debts.

Claiming they knew the partnership holdings, and knew them to be valuable, and capable if operated by the creditors, of satisfying every indebtedness of the firm within a period of six months, in addition to which valuable assets in the form of timber, a saw-mill, and other properties would remain to the benefit of the creditors of the partnership, while if sold at auction

great loss might be incurred; certain creditors of said partnership, representing the majority, and the majority of the claims of said firm, to-wit: F. L. McGrew, C. D. Le Masters, and Curtis Cutter, entered into an express agreement by and with claimant herein with the consent of the said Roy W. Blair, trustee, respondent herein, and counsel for said trustee A. B. Reynolds, Esq., who was present and active in all these proceedings.

WHEREBY, in consideration of the transfer by claimant of all his interests in the said partnership firm and business, to them, the said creditors; said parties agreed to take over and operate and conduct the business of the said firm, in the interest of the said creditors, and for the purposes aforesaid; and when, upon the said payments being made and obligations being terminated, upon the part of the said F. L. McGrew, trustee for said creditors (that is, after satisfying all of the firm's liabilities), the said F. L. McGrew reserves the right to dispose of the remaining firm assets according to his own good pleasure. (Tr., p. 25.) Briefly, as a consideration for the transfer to the creditors of the firm of his interests in the firm property, the said creditors agreed to pay, satisfy and

discharge the firm's liabilities, with such profit to themselves as fortune might provide. (Tr., pp. 24-25.)

Pursuant to the terms of the said agreement, and relying on the promises, covenants and agreements therein set forth, claimant executed the same, and as part of the same transaction claimant made, executed and delivered to the said creditors the deeds necessary to convey to said creditors claimant's interest and interests in and to the real property of the said firm, and said deeds were by said parties accepted, said agreement was by said parties signed, and the property of the said firm was taken over by said parties, and at the time of the filing of this appeal, was still being held, operated and conducted by them, the said parties aforesaid. (Tr., p. 31.)

That, subsequent to the time of the making of said agreement aforesaid, the said trustee in bankruptcy, Roy W. Blair, respondent herein, filed a notice of election to abandon all interest of the bankrupt in and to the partnership property, with certain reservations. (Tr., p. 27.)

That, thereafter and on or about the month of October, 1924, S. N. Douglass, the only individual creditor of petitioner, whose claim in

the sum of $3000.00 was secured by a chattel mortgage (Tr., p. 12), died, leaving said claim to petitioner, claimant herein, by gift *causa mortis;* claimant thereby coming into possession of this property more than five months subsequent to the date of his adjudication, is a legal claimant against his own estate. (Remington on Bankruptcy, Section 1395.)

That, thereafter, on the 12th day of December, 1924, claimant filed a petition praying that he be discharged. (Tr., p. 31.)

That, thereafter, on the 27th day of January, 1925, the referee in bankruptcy, Evan J. Hughes, ordered claimant to turn over all of his property to the trustee Roy W. Blair, respondent herein. (Tr., p. 32.)

That, thereafter, claimant filed a petition for a review of said order. (Tr., p. 32.)

That, thereafter, to-wit: on the 14th day of March, 1925, the court, without inquiring into the merits of claimant's position, affirmed the order of the referee. (Tr., p. 32.)

That, thereafter, claimant sought to have the court confirm the agreement made between claimant and the creditors of the partnership in the month of June, 1924, aforesaid (Tr., p. 33), but could not succeed in getting the matter

before the court. (Tr., p. 33.)

That, thereafter, on July 14th, 1925, a notice of application for authority to sell the property of claimant, including his stage line and business, was published by the referee. (Tr., p. 34.)

That, on said meeting being called for the purpose last above stated, no individual creditors of the bankrupt were in attendance, and no creditors whatsoever were in attendance, and no creditors were represented at said meeting, save and except those partnership creditors and actual participants in the agreement of June, 1924, who had received all of claimant's partnership interests upon the terms and conditions heretofore set forth, and on (Tr., pp. 21-26) and who were, and are to this day, the owners and holders thereof.

That, claimant by his counsel opposed and resisted the granting of the authority to sell the individual property of the bankrupt, for the purpose of paying off the claims of partnership creditors, which, first, had already been settled by express agreement, and, second, if the partnership creditors had any right whatever to recover against the individual estate, it must be exercised only after they had completely exhausted the partnership estate. (Tr., p. 35.)

That, despite this contention upon the part of claimant, said referee ordered the trustee (who in more than a year subsequent to the date of adjudication had failed to take possession of same), to take the property and business of claimant, and sell it to the highest bidder for cash.

That, thereupon claimant sought the aid of the court to restrain the trustee Roy W. Blair, respondent herein, from proceeding with the sale of his, claimant's, said property (Tr., p. 38), and procured from Hon. A. F. St. Sure, Judge of the District Court, an ORDER TO SHOW CAUSE. (Tr., pp. 38-39.)

That, thereafter, to-wit: on the 21st day of August, 1925, the said matter being presented to the court, and the court having heard the argument of counsel for petitioner and claimant, and for trustee and respondent, herein, the court by its order regularly made and entered in said cause, denied the restraining order, and dissolved that heretofore issued, and referred claimant and his said cause back to the referee. (Tr., pp. 39-40.)

From this order claimant, feeling aggrieved, appeals.

ARGUMENT.

The bankrupt, at the date of his adjudication upon an individual voluntary petition, had a one-third interest in a partnership firm and business of the value of $12,580.00 or thereabouts, to-wit: One-third of a total valuation of $37,750.00 (Tr., p. 13). This property, in the absence of any adjudication of the firm in bankruptcy, was not available to the trustee, and could not be administered in bankruptcy without the consent of the remaining partners.

Bankr. Act, Section 5.
In re Bertenshaw, 19 A. B. R. 577.
In re Hansley & Adams, 36 A. B. R. 1, 288 Fed. 564 (D. C. Cal.)
Tate vs. *Brinser,* 34 A. B. R. 660.
Francis vs. *McNeal,* 228 U. S. 695.
Armstrong vs. *Fisher,* 34 A. B. R. 701.

Civil Code of California, Section 2405.

The partnership creditors, at the time of said adjudication of the petitioner, had two courses open for their selection. They could have compelled the firm, if insolvent, to come into the bankruptcy court, or otherwise procured the consent of the remaining partners to permit the firm to become adjudicated in bankruptcy; or, they could, if they so desired, take over under

certain satisfactory arrangements, the entire partnership business and property, and with the consent of the partners, operate, and carry on the said business to their own profit and enrichment. And having decided upon that course which seemed best to them, and having executed the necessary contracts, and taken over the property and holdings of the firm, upon a promise to pay and discharge its liabilities, they have acted well within their rights.

However, the other side of their contract presents a burden which appears to have escaped their notice, to-wit: the bankruptcy law of the United States, and the wise decisions of our Federal Courts, which hold as follows:

> "If they elect to assume such a contract, they are required to take it *cum onere,* as the bankrupt enjoyed it, subject to all its provisions and conditions, in the same plight and condition in which the bankrupt held it."
>
> *Mercantile Trust Co.* vs. *Farmers Loan Co.,* 81 Fed. 254.
>
> *Central Trust Co.* vs. *Continental Trust Co.,* 86 Fed. 517.
>
> *In re Chambers, Calder & Co.,* 98 Fed. 865.
>
> *Watson* vs. *Merrill,* 14 A. B. R. 453.

And the law of the sovereign State of Cali-

fornia, our Supreme Court having held in the case of such contracts, as follows:

> "Transfer of partnership interest, to a person not a partner, who, as part consideration, assumes debts, takes them *cum onere,* and if the credits turn out to be in excess of their supposed value, the purchaser is entitled to the excess, and if the debts are larger than is supposed, he must bear the burden."

Olmstead vs. *Dauphiny,* 104 Cal. 635-639.

Claimant contends, and we respectfully submit, that the Supreme Court of the State of California appears to agree with the contention that, at the time of the signing of the contract between claimant, petitioner in bankruptcy, and his creditors of the partnership firm, a new firm was created by novation, to-wit: the remaining members of the partnership together with the contracting creditors, who agreed in consideration of the delivery to them of the interests of claimant in the old firm of Pierce, Pierce and Douglass, that they would operate and carry on the business of the firm, dispose of its property, and liquidate its debts.

Robinson vs. *Rispin,* 33 Cal. App. 536.

> "Sale of partner's entire interest in partnership property dissolves co-partnership."

Miller vs. *Brigham,* 50 Cal. 615.

The solvent partners, the creditors of the partnership, and the partner in bankruptcy had a legal right to make such a contract for the liquidation and payment of the firm debts, for:

> "Where partnership property is being administered in the individual bankruptcy proceedings of one of the partners a contract such as this, will not be affected by the individual bankruptcy of the partner, for the individual estate, which is the only bankrupt estate involved, has not been depleted."
>
> *McNair* vs. *McIntyre*, 7 A. B. R. 638.
>
> Remington on Bankruptcy, Section 1651.

The purpose of the contract, was the liquidation of the partnership liabilities; and:

> "The net proceeds of the partnership property must be appropriated to the payment of the partnership debts."
>
> *In re Knowlton*, 202 Fed. 480.
>
> *In re Abrams*, 193 Fed. 271.
>
> *In re Denning*, 114 Fed. 219.
>
> *Lacey* vs. *Cowan*, 162 Ala. 546.
>
> "The surplus, if any, being added to the assets of the individual partners in proportion to their respective interests in the partnership."
>
> *In re Denning*, 114 Fed. 219.
>
> *Lacey* vs. *Cowan*, 162 Ala. 546.

The courts will not make contracts for the creditors of the firm, nor will they interfere with contracts legally entered into between the parties, but the courts will examine such contracts and pass upon the legality thereof, and determine the rights of the parties thereunder, regardless of the wisdom or folly displayed by either party to such contract; the contracting creditors were the creditors of the firm, and as such, could not prove their claims against the individual estate of the bankrupt partner—

> *Lamville County Nat. Bank* vs. *Stevens,*
> 107 Fed. 245, 7 Corpus Juris 282

—and it may be, that this fact received some consideration prior to the execution of the agreement between themselves, the remaining partners, and the bankrupt partner.

On the death of S. N. Douglass, individual creditor of the bankrupt, the petitioner, by gift to him of the chattel mortgage left by said deceased, as security for the payment of the sum of $3000.00 about five months subsequent to the date of his adjudication in bankruptcy, became, in his new estate, the largest, and only individual creditor of his bankrupt estate, whose claim could not be fully paid.

> "Property acquired after adjudication does not pass to the trustee at all, but be-

longs to the debtors' new estate, and is subject only to the claims of new creditors."

In re Smith, 1 A. B. R. 37.

In re LeClaire, 10 A. B. R. 733.

In re Wetmore, 6 A. B. R. 210, Circuit Court of Appeals of Penn. Affirming, 3 A. B. R. 700.

The trustee is the representative of the individual creditors of the bankrupt, and must preserve the estate for the satisfaction of their claims against the claims of partnership creditors. (Section 2405, Civil Code.)

The trustee, in seeking authority to sell the property of the bankrupt, sought such authority at the request of the partnership creditors, with whom a composition had already been made, and said creditors, in active operation of the partnership property under the said agreement, had disposed of several portions of the firm assets, and had paid off certain of the firm creditors. (Tr., p. 31.) This, claimant contends is contrary to the duties of such trustee and the rights of the trustee in bankruptcy under the ruling of the court in *Batchelder, etc., Co. vs. Whitmore,* to-wit:

"A trustee in bankruptcy cannot assert rights as representative of creditors who were parties to a prior composition with the

> bankrupt which they have not sought to avoid."
>
> *Batchelder, etc., Co.* vs. *Whitmore,* 122 Fed. 355.

In the instance cited above, the composition creditors and the bankrupt were both within the jurisdiction of the court, whereas in the case at bar, the partnership estate was not being administered in bankruptcy, and the firm and its creditors, had a legal right to enter into any agreement looking to a satisfactory settlement of its debts.

The right of the bankrupt to take part in such an agreement is set forth in Collier on Bankruptcy, 8th Ed., p. 238, as follows:

> "It can safely be asserted, then, that even under the present law, the assets of the bankrupt, even after the same are vested in the trustee, can be used by him, if not by direct deposit, at least by indirection, to accomplish a composition."
>
> Collier on Bankruptcy, 8th Ed., p. 238.

We think, in view of the facts and circumstances hereinbefore set forth, and the authorities cited, that the legality of the agreement of the parties Tr., pp. 21 to 26, incl.) is clearly shown, and that the parties are bound by its terms. Yet, should this Honorable Court, in its

wisdom and experience, disagree with claimant's contention, we respectfully submit that, under the laws of the State of California, Civil Code, Section 2405, and the bankruptcy laws of the United States, claimant is entitled to have all of the partnership property and assets first exhausted, before the individual rights of the individual creditors of the bankrupt are impaired and lost by reason of a sale of his individual estate at the request of the firm creditors.

In re Denning, 114 Fed. 219.
Lacey vs. *Cowan,* 162 Ala. 564.
In re Abrams, 193 Fed. 219.
In re Knowlton, 202 Fed. 480.

We also respectfully submit that, having taken possession of the firm properties, and having operated and conducted the same for a period of eighteen months, the contracting creditors should be compelled to account for the proceeds received from the sale of the firm property, both real and personal, and if any further indebtedness has been incurred by them, in their effort to operate the same, that they, and not the former partnership firm, should be ordered to make good such indebtedness.

And that, until such time as these matters have been settled and shown to have been ac-

complished to the satisfaction of the court, said trustee, Roy W. Blair, respondent herein, and said creditors should be enjoined and restrained from interfering with the individual estate of the bankrupt.

That, should the court agree with the contention of this claimant, to-wit: that the partnership creditors are bound by their contract to the assuming of the partnership liabilities, and must abide by their agreement; then, claimant prays that the court make an order dismissing the petition in bankruptcy of petitioner Russell O. Douglass, upon his paying such regular costs and charges as may have been legally incurred in the administering of his estate, he being the only individual creditor remaining unpaid, by reason of the creation of the new estate in him, as set forth on pages 13 and 14 of claimant's brief herein.

Dated at Sacramento,..............................., 1926.

Respectfully submitted,

PETER J. WILKIE, Esq.,
Attorney for Petitioner and Claimant.

Due service and receipt of 3 copies of the within is hereby admitted this 20th day of January, 1926.

A. B. Reynolds

Attorney for Respondent.

No. 4693

6

IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

IN THE MATTER OF
RUSSELL O. DOUGLASS,
Bankrupt,
RUSSELL O. DOUGLASS,
Petitioner,

vs.

ROY W. BLAIR, as Trustee in Bankruptcy of the Estate of Russell O. Douglass,
Respondent.

Brief of Respondent and Appellee

A. B. REYNOLDS,
GEORGE E. McCUTCHEN,
Ochsner Building, Sacramento, California,
Attorneys for Respondent and Appellee.

P. J. WILKIE,
304 Nicolaus Building, Sacramento,
Attorney for Petitioner and Claimant.

FILED
MAR 2 1926
F. D. MONCKTON,

INDEX

Page

The partnership creditors were properly allowed to prove their claims in the Bankruptcy of Petitioner........ 3

There has been no novation or release of partnership debts 8

All the matters sought to be adjudicated have been settled by a former judgment which has become final...... 13

The Appeal should be dismissed for failure to bring up the record 15

Conclusion 17

CITATIONS

Bardwell vs. Perry, 19 Vt. 292; 47 Am. Dec. 687.
Beach vs. Macon Grocery Co., 120 Fed. 736; 9 A. B. R. 762.
Brandenburg on Bankruptcy (Fourth Edition), p. 424.
Chapin vs. Brown, 101 Cal. 500.
Chapman vs. Bowen, 207 U. S. 89, 52 U. S. (L. Ed.), 116.
Clint vs. Eureka Crude Oil Co., 3 Cal. A. 463.
20 Cal. Juris. 252.
Emeric vs. Alvarado, 64 Cal. 529.
Francis vs. McNeal, 228 U. S. 695.
In re Bacon, 159 Fed. 424; 20 A. B. R. 107.
In re Baum, 169 Fed. 410; 22 A. B. R. 295.
In re Boston Dry Goods Co., 125 Fed. 226; 11 A. B. R. 97.
In re Chambers, Calder & Co., 98 Fed. 865.
In re Hee, 13 A. B. R. 8.
In re Mercur, 95 Fed. 634; 2 A. B. R. 626.
In re Oakland Lumber Co., 174 Fed. 634; 23 A. B. R. 181.
In re O'Connell, 137 Fed. 838; 14 A. B. R. 237.
In re Wood, 248 Fed. 246.
In re Pettigill & Co., 137 Fed. 840; 14 A. B. R. 757.
In re Schuman, 276 Fed. 292.
Lamville County Nat. Bank vs. Stevens, 107 Fed. 245; 6 A. B. R. 164.
Landry vs. San Antonio Brewing Ass'n, 159 Fed. 700; 20 A. B. R. 226.
Market Street Railway vs. Hellman, 109 Cal. 571.
Meyer vs. Parsons, 129 Cal. 653.
Mills vs. J. H. Fisher & Co., 159 Fed. 897; 20 A. B. R. 237.
Molera vs. Cooper, 173 Cal. 259.
Olmstead vs. Dauphiny, 104 Cal. 635.
Remington on Bankruptcy, Third Edition, No. 238.
6 Cal. Juris. 229.
Rice vs. Barnard, 20 Vt. 479; 50 Am. Dec. 54.
3 Ruling Case Law, p. 213.
Sheffield vs. Gordon, 151 U. S. 285.
Twekesbury vs. O'Connell, 21 Cal. 61.

No. 4693

IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

IN THE MATTER OF
RUSSELL O. DOUGLASS,
Bankrupt,
RUSSELL O. DOUGLASS,
Petitioner,

vs.

ROY W. BLAIR, as Trustee in Bankruptcy of the Estate of Russell O. Douglass,
Respondent.

Petitioner and appellant, the bankrupt, claiming to be a creditor by virtue of a gift of the claim of his brother, resisted the efforts of the trustee in bankruptcy, the respondent and appellee herein, to take possession of his individual

assets and, having been unsuccessful in this effort, now seeks to prevent the sale of his assets in the bankruptcy proceeding. The referee in bankruptcy after a full hearing ordered the sale to be made. Petitioner and appellant thereupon petitioned the District Court for a revision and upon affidavit secured an order to show cause returnable on August 18th, 1925. A hearing was held on August 21st, 1925, by said District Court, evidence was received and after full consideration and argument the order to show cause was dissolved by the minute order from which this appeal was taken. Petitioner and appellant has not seen fit to bring here in his transcript on appeal any of the evidence taken at this hearing (save the verified petition therefor), requested no findings of fact from the referee or from the District Court, and no findings of fact were made by either tribunal.

Petitioner and appellant advises us on page two of his brief that this proceeding was instituted to escape from certain partnership creditors to whom he was also individually liable. He listed these in his schedules and includes therein seventeen partnership creditors. Obviously one of the objects of this bankruptcy is to obtain a discharge of these obligations. Yet he now contends that these partnership creditors are not interested in his estate, cannot file claims

therein, and that there was a novation after the bankruptcy by which a new firm was substituted as debtor thereon. The position of respondent and appellee is that the judgment should be affirmed for four reasons: (1st) The partnership creditors were properly allowed to prove their claims in the bankruptcy of this individual; (2nd) there has been no novation or release of these debts; (3rd) all the matters sought to be adjudicated here have been settled by a prior judgment which has become final, and (4th) appellant should be denied any relief for his failure to bring up the record.

THE PARTNERSHIP CREDITORS WERE PROPERLY ALLOWED TO PROVE THEIR CLAIMS IN THE BANKRUPTCY OF PETITIONER.

"Every general partner is liable to third persons for all the obligations of the partnership jointly with his co-partners." California Civil Code, Sec. 2442. And this is but a re-statement of the general rule of liability existing in every common-law jurisdiction. This general principle governs except so far as it may be changed by the laws relating to bankruptcy. The Bankruptcy Act makes certain provisions for the marshalling of assets and by Section 5 (f)

provides:

> "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts . . . ."

This provision would seem clear enough but appellant cites 7 Corpus Juris. 282 as holding that a partnership creditor cannot prove his claim against the individual estate. The portion involved reads as follows:

> "A firm creditor may prove his claim against the estate of the partnership but not against the estate of an individual partner. Where a bankrupt firm and the individual partners are jointly liable, the creditor may prove his claim against the estate of the partnership and also against the estate of the individual partners."

In support of the first proposition a few decisions are cited which do not appear to have taken into consideration the above quoted clear and decisive language of the Bankruptcy Act.

Among these is *Lamville County Nat. Bank v. Stevens,* 107 Fed. 245; 6 A. B. R. 164, upon

which appellant seems to place considerable reliance. Upon examination it will be seen that the decision comes from Vermont where the rule is that partnership creditors must absolutely exhaust the partnership assets before they can have any claim against the individual partner.

> *Bardwell* v. *Perry,* 19 Vt. 292; 47 Am. Dec. 687.
> *Rice* v. *Barnard,* 20 Vt. 479; 50 Am. Dec. 54.

Others of the decisions come from states like Louisiana where a partnership is a more distinct entity and quite different rules of liability govern.

Other writers have taken the opposite view. For example:

> "If one partner files a voluntary petition seeking a discharge from both individual and firm debts, and is adjudged bankrupt, but no adjudication is made against the firm, the firm creditors may prove their debts and subject bankrupt's interest in the firm property to the payment thereof. If the firm property is not brought into bankruptcy and there are no firm assets, it has been held that a partnership creditor may share with the individual creditors in the estate of the bankrupt individual partner."

> *Brandenburg on Bankruptcy* (4th ed.), p. 424.

> "A partnership debt is provable against the bankrupt estate of an individual partner," and "There is authority .... that an order allowing a creditor's claim against the bankrupt estate of an individual partner and also against the estate of the bankrupt partnership, the allowance against the individual estate being made subject to the claims of the individual creditors of that estate, proceeds upon well settled principles of law broad enough to sustain it without reference to the provisions of the bankruptcy law."
>
> 3 Ruling Case Law, p. 213.

A direct adjudication of our Supreme Court furnishes the basis for the latter statement. In this case partnership claims were allowed in the bankruptcy of the individual partner but the allowance was made subject to the preferential rights of the individual creditors. This was said to proceed upon well settled general principles of law, though it is to be noted that it was in accordance with the above quoted provision of the Bankruptcy Act.

> *Chapman* v. *Bowen*, 207 U. S. 89; 52 U. S. (L. Ed.) 116.

A later decision of the Supreme Court, arising out of a somewhat different state of facts, discusses the problem quite clearly and throws considerable light upon it. Here the partnership had been adjudicated bankrupt and the in-

dividual partner, who was not in bankruptcy, was endeavoring to retain all of his individual assets upon reasoning similar to that used by appellant here. In considering this situation, Mr. Justice Holmes said:

> "But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshalling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the Bankruptcy Act."

Francis v. *McNeal*, 228 U. S. 695.

In involuntary proceedings the question as to the status of partnership creditors has been directly adjudicated. These decisions are of interest since the Courts were not concerned there (and we are not here) with questions of priority and the marshalling of assets. The holdings are uniformly to the effect that a partnership creditor is a proper petitioner in involuntary bankruptcy against an individual.

In re Hee, 13 A. B. R. 8.
In re Mercur, 95 Fed. 634; 2 A. B. R. 626.
Mills v. *J. H. Fisher & Co.,* 159 Fed. 897; 20 A. B. R. 237.
No. 238 Remington on Bankruptcy (3rd ed.)

Thus it appears that partnership creditors are entitled to prove their claims in the bankruptcy of the individual partner. This is true because the partners are jointly and severally liable for partnership debts in California and the Bankruptcy Act does not attempt to divest this liability. And while it does provide for the marshalling of assets, we are not concerned with the relative rights of the several classes of creditors at this stage of the bankruptcy proceedings. Moreover, it is to be questioned whether petitioner and appellant is in a position to raise this objection. He filed his schedules listing these persons as his creditors. They have been delayed in enforcing their obligations by this bankruptcy. If he is a creditor of his estate, as he claims to be, he should be estopped to make this objection.

THERE HAS BEEN NO NOVATION OR RELEASE OF PARTNERSHIP DEBTS.

In support of his position that there was a novation which released him from the partnership debts, petitioner and appellant offers a purported contract signed by one secured creditor as trustee but not individually and by one other secured creditor. The contract (Trans., pp. 21-26) recites that it is made between the

debtors, F. L. McGrew, trustee, and "the several persons, companies and firms whose names are hereunto signed." In the middle of it appears "It is agreed that said C. D. LeMaster and Curtis H. Cutter, two of the subscribing creditors," shall make certain advances. The only signatures other than those of the partners and their wives are "F. L. McGrew, Trustee, and C. D. LeMasters." Curtis H. Cutter did not sign at all, F. L. McGrew only signed as trustee and none of the other creditors referred to and no unsecured creditor assented in this proposed arrangement.

Petitioner and appellant contends that this contract should be interpreted as releasing him from his partnership obligations. To accomplish such a purpose it would have to be signed by the partnership creditors.

> "A contract purporting to be made between several parties, containing mutual covenants of which those of one party are the consideration of those of the other, must, to be valid, be executed by all."
>
> 6 Cal. Juris. 229.
> *Emeric* v. *Alvarado,* 64 Cal. 529.
> *Tewkesbury* v. *O'Connell,* 21 Cal. 61.
> *Clint* v. *Eureka Crude Oil Co.,* 3 Cal. A. 463.

But we do not interpret this contract as releasing him. The only provision relating to the

rights of the creditors who were expected to sign the agreement is that after the payment of certain other claims "the said trustees shall use the assets accumulated from time to time to be distributed to the general creditors at such time as may hereafter be agreed upon by such trustee and the creditors' committee hereinafter named." There is nothing here by which any creditor who might have signed it would release this bankrupt or consent to the substitution of a new debtor. And there can be no novation unless the debtor agrees to accept the new debtor in place of the old.

> "An agreement between the debtor and another that such other shall pay the debtor's creditors does not amount to a novation where the creditors do not assent, or are not parties to the understanding."
>
> 20 Cal. Juris. 252.
> *Meyer* v. *Parsons*, 129 Cal. 653.
> *Market Street Railway* v. *Hellman*, 109 Cal. 571.
> *Molera* v. *Cooper*, 173 Cal. 259.
> *Chapin* v. *Brown*, 101 Cal. 500.

The facts of the last case cited are somewhat similar to the situation presented here. There a partnership, which had been engaged in the business of cutting and delivering lumber, was changed by the admission of a new partner. The new partnership continued to deliver lum-

ber under the contract of the former one and the creditor received the lumber without objection. It was held that this dealing with the new partnership did not operate by novation or otherwise to release the first partnership from its contract.

At one point in his brief, petitioner and appellant contends strenuously that he had a right to enter into this contract, while at another he seems to take the position that the trustee has assumed something and must take the burdens with it. His title passed to respondent and appellee, the trustee in bankruptcy, and the bankrupt could do nothing except to preserve the property, but his partners had a right to continue their administration of the partnership business. The trustee made no effort to interfere with them or with this contract which they made. After an examination he wisely decided to abandon the property as worthless. His right to take such a course is affirmed by one of the decisions quoted by appellant.

> *In re Chambers, Calder & Co.*, 98 Fed. 865.

There it was held that the trustee was not bound to accept property or to assume a burdensome contract. The case involved the retention of possession of some leased premises. The re-

tention for a short time did not constitute an assumption of the lease and the estate was only liable for rent for the time the premises were occupied.

Since the trustee did abandon this partnership property and had no connection with the contract, it is difficult to understand the application of the cases cited on page ten of appellant's brief. They enunciate the proposition that a trustee who assumes a contract takes it with its burdens. And *Olmstead* v. *Dauphiny,* 104 Cal. 635, applies only to a situation where one buys a business and assumes the debts without knowing exactly what they are. There he was held to have assumed those of which he did not know as well as those known to him.

In the case at bar the trustee did not assume any contract. He very wisely abandoned this heavily encumbered property as worthless. The contract relied on by appellant did not provide for any release of the bankrupt from his obligations, and, even if it had done so, it would not concern us since the parties did not execute the contract. We conclude that there has been no novation or release by the creditors.

ALL THE MATTERS SOUGHT TO BE ADJUDICATED HAVE BEEN SETTLED BY A FORMER JUDGMENT WHICH HAS BECOME FINAL.

It appears from the petition to revise (Trans., p. 2) that the referee in bankruptcy ordered petitioner and appellant to turn all of his property over to respondent, the trustee in bankruptcy, and that petitioner resisted said order and petitioned the District Court for a revision thereof. The matter was heard by the Hon. George M. Bourquin, who denied the petition. In doing so he aply stated that petitioner "virtually claims his bankruptcy is but pretended, and strategy to hinder and delay creditors——was in bad faith! Although this might afford ground for inquiry anent his abuse of the equity powers of the Court, it can avail him nothing to avoid his duty to deliver up his property, so long as the adjudication in bankruptcy stands." (Trans., p. 29.)

It will be noted that all of the points raised by petitioner and appellant in resisting the order of sale of his property were and could be raised on appeal from the order directing him to surrender his property to the trustee.

Where errors or defects have already been reviewed in another proceeding, they will not be reviewed again. The proposition is a general one and applies in bankruptcy matters as well as in other classes of litigation.

> *Beach* v. *Macon Grocery Co.*, 120 Fed. 736; 9 A. B. R. 762.

And it has been applied to a set of facts essentially similar to the case at bar. In one instance an order was made directing certain property turned over to the trustee until the wife of the bankrupt should establish her title thereto. This order was made in the bankruptcy proceeding and was not appealed from. Later the referee after a hearing ordered the property turned over to the trustee. The wife then objected that the referee had no jurisdiction. The Court held:

> "Having elected to go on with such examination without taking any further steps to review the orders under which it was conducted, petitioner cannot now be heard to question the jurisdiction."

> *In re Bacon*, 159 Fed. 424; 20 A. B. R. 107.

It is submitted that petitioner and appellant finds himself in a similar position. When ordered to surrender his property to the trustee he resisted to the extent of petitioning for a revision

of that order. No doubt stung by Judge Bourquin's just rebuke, he became afraid of the consequences and desisted. Having allowed that judgment to become final, he should not be heard now to complain of the same alleged errors.

THE APPEAL SHOULD BE DISMISSED FOR FAILURE TO BRING UP THE RECORD.

As previously stated, petitioner and appellant has brought here only his affidavit and the order from which the appeal was taken. The affidavit was the basis for an order to show cause which was dissolved after a full hearing by the District Court. He supplies us with none of the evidence taken at that hearing. He requested no findings of fact and none were made. The great weight of authority is that in such cases the Court will refuse to even consider the matter.

Our Supreme Court has passed upon an analogous situation in a case where a master was appointed to take testimony but was not directed to preserve it and certify it to the Court. Although the evidence brought up did not support some of the findings, the Court presumed that there was other evidence to support these.

Sheffield v. *Gordon,* 151 U. S. 285.

The reason for the rule is thus stated in a decision from the Second Circuit:

> "Manifestly we are not at liberty to consider as facts statements made in the briefs of the petitioning creditors which are unsupported by the record."

In re Oakland Lumber Co., 174 Fed. 634; 23 A. B. R. 181.

In an earlier case the Court simply assumed that the District Court had received evidence sufficient to support its decision in a case in which, as here, no findings were made.

In re O'Connell, 137 Fed. 838; 14 A. B. R. 237.

And where a petition to revise contained no agreed statement of facts and no findings, review was denied in

Landry v. *San Antonio Brewing Assn.,* 159 Fed. 700; 20 A. B. R. 226.

In another case where the record disclosed no findings of fact and no application to the Court therefor, the Court refused to consider the matter at all.

In re Boston Dry Goods Co., 125 Fed. 226; 11 A. B. R. 97.

Numerous other cases to the same effect can be found throughout the reports. Among them are:

In re Pettigill & Co., 137 Fed. 840; 14 A. B. R. 757.
In re Baum, 169 Fed. 410; 22 A. B. R. 295.
In re Schuman, 276 Fed. 292.
In re Wood, 248 Fed. 246.

By his failure to have findings made, petitioner and appellant has made it impossible for us to present a number of our contentions to this Court in proper fashion. He has carefully culled out a small portion of the record which he thinks will support his claims and brought only that part here. This attitude makes it difficult or impossible for the Court to get before it all of the facts and limits us to those defects appearing on the face of the portion of the record with which he has favored us. Taking into consideration the fact that he is trying by these means to retain all of his assets and secure a discharge of his partnership obligations, we submit that this Court should enforce the rule against him with all its rigor and should refuse to even consider the matter.

CONCLUSION.

Petitioner and appellant was engaged in the stage business by himself and had substantial

assets in connection therewith. He was also a partner in a lumber business. The lumber business became involved and unable to meet its debts. Petitioner thereupon filed his bankruptcy petition and listed as creditors the creditors of the partnership. Thereafter, although his interest in the partnership business had passed to the trustee, he attempted to join his partners in a contract by which the lumber business was to be continued and any profits were to be paid to the partnership creditors. This attempted contract was not properly executed. He cannot now contend that these partnership creditors are not proper claimants in the bankruptcy proceedings or that their debts have been discharged or a novation accomplished by an agreement not executed by all of the parties and not assented in by his creditors. Moreover, he has already resisted the order to surrender his property upon the identical grounds raised here. He petitioned the District Court to revise this order and, when his petition was denied, allowed this judgment to become final. He now selects a tiny portion of the record on the order of sale and brings it to this Court in an effort to escape the consequences of filing his petition in bank-

ruptcy. He is seeking a discharge of his obligations without surrendering his property. He is entitled to no relief.

Respectfully submitted,

A. B. R*EYNOLDS,*

GEORGE E. McCUTCHEN,

Attorneys for Respondent and Appellee.

No. 4694

7

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANCES INVESTMENT COMPANY, a Corporation,

Appellant,

vs.

JASPER THOMASON,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

FILED
SEP 21 1925
F. D. MONCKTON,
CLERK

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANCES INVESTMENT COMPANY, a Corporation,

Appellant,

vs.

JASPER THOMASON,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

PAGE

Affidavit 163
Affidavit of Emma Harris........................305
Affidavit of Gladys T. Schupp...................309
Affidavit of Joseph L. Lewinson in Support of Motion for Continuance...........................240
Affidavit of Joseph L. Lewinson Opposing Motion to Quash 247
Affidavit of Joseph L. Lewinson.................273
Affidavit in Support of Motion to Vacate Judgment 152
Affidavit in Support of Motion to Vacate Judgment 156
Affidavit in Support of Motion to Vacate Judgment 159
Affidavit of Meryle Davis.......................302
Affidavit of Meryle Thompson Davis.............260
Affidavit of Meryle Thomason Davis.............253
Affidavit of Nellie M. Thomason.................307
Affidavit of Rosamond Mildred Hunt.............258
Affidavit of Rosamond Hunt......................297
Affidavit of Service............................331
Affidavit of W. S. Mortensen....................256
Affidavit of W. S. Walton.......................274
Affidavit of Verna T. Slack.....................311
Alias Subpoena 213
Amended Supplemental Bill in Equity............123
Application to Amend Marshal's Return Nunc Pro Tunc 268
Assignment of Errors............................338

Bill in Equity........................ 4
Petition 28
Bond 343
Citation 2
. Order to Enter Default.................. 70
Findings of Fact and Decree................ 72
Clerk's Certificate 358
Clerk's Office Praecipe....................220
Default 221
Final Decree 222
Memorandum Opinion and Order...............320
Memorandum of Points and Authorities in Support
of Motion to Quash Service of Subpoena, etc...162
Memorandum of Points and Authorities in Support
of Motion to Quash Service of Subpoena, etc...166
Minutes of the Court.......................219
Motion to Quash Service of Subpoena..........235
Minutes of the Court.......................246
Memorandum of Authorities in Support of Court's
Jurisdiction and Application for Orders Nunc
Pro Tunc 271
Memorandum in Opposition to Application to
Amend Marshal's Return...................279
Minutes of the Court.......................119
Minutes of the Court.......................330
Minutes of the Court.......................332
Minute Order on Motion to Quash.............317
Motion to Set Aside Order Quashing Service of
Subpoena and Setting Aside Judgment Against
Defendant Jasper Thomason.................325
Names and Addresses of Attorneys............ 1
Notice 121
Notice of Motion.........................324
Notice of Motion for Continuance.............238

Notice of Motion to Set Aside Order Quashing Service of Subpoena, etc. 323
Notice of Petition for Appeal 333
Notice of Special Appearance and of Motion to Quash Service of Subpoena 148
Order for Service of Subpoenas 115
Order Relative to Filing Affidavit of W. S. Walton and Amendment to Marshal's Return Nunc Pro Tunc 318
Petition for Appeal 336
Praecipe 347
Praecipe for Entry of Special Appearance 233
Praecipe for Inclusion of Additional Portions of Record in Transcript 355
Reply Brief on Motion to Quash 183
Reply to Defendant Thomason's Affidavits in Brief 314
Subpoena 87
Stipulation 353
Stipulation for Leave to File Supplemental Bill of Complaint 90
Subpoena 116
Supplemental Bill in Equity 92

Names and Addresses of Attorneys.

For Plaintiff and Appellant:

WILLIAM STORY, JR., Esq.,
JOSEPH L. LEWINSON, Esq.,
Bartlett Building,

and

LAURENCE W. BEILENSON, Esq., of Counsel, Suite 1231 C. C. Chapman Building, Los Angeles, California.

For Defendant and Appellee:

WM. T. KENDRICK, Esq, Van Nuys Building;
NEWLIN & ASHBURN, Esqrs., Suite 935 Title Insurance Building, Los Angeles, California.

United States of America, ss.

To the defendant Jasper Thomason, and to William T. Kendrick, Esquire, and Newlin and Ashburn, Esquires, his solicitors, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 19th day of August, A. D. 1925, pursuant to petition for appeal and order allowing appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain case in the District Court of the United States, Southern District of California, Southern Division, in Equity, D-61-J, in which Frances Investment Company, a corporation, is plaintiff, and Friend J. Austin, et al, and you are defendants to show cause, if any there be, why the order entered on the 25th day of May, 1925, quashing the service on defendant Jasper Thomason and setting aside the decree as to defendant Jasper Thomason, and the order entered on the 9th day of July, 1925, denying plaintiff's motion to set aside said order of May 25th, 1925, in the said suit in equity hereinbefore mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM P. JAMES United States District Judge for the Southern District of California, this 20th day of July, A. D. 1925, and of the Independence of the United States, the one hundred and fifty-*first*

Wm P James

U. S. District Judge for the Southern District of California.

Received a copy of the within Citation this 20th day of July, 1925.

Wm. T. Kendrick
Newlin & Ashburn

Solicitors for Defendant Jasper Thomason appearing specially herein for purpose of contesting jurisdiction over person and not appearing generally herein.

[Endorsed]: IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FRANCIS INVESTMENT COMPANY, A CORPORATION, Plaintiff, vs. FRIEND J. AUSTIN, et al., Defendants. Citation FILED JUL 20 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk.

In Equity No.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation,
Plaintiff,
vs
FRIEND J. AUSTIN, LETTIE M. AUSTIN, his wife, WILLIAM MARTIN BELFORD, and ANNIE MARIE BELFORD, his wife, and THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation,
Defendants.

BILL IN EQUITY.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

Frances Investment Company, a corporation organized and existing under and by virtue of the laws of the state of Utah, and a resident of said state, with its principal place of business in the city of Salt Lake, state of Utah, brings this its bill against Friend J. Austin, Lettie M. Austin, his wife, William Martin Belford, Annie Marie Belford, his wife, citizens of the state of California and residents of the county of Imperial, state of California, and The Peoples Abstract & Title Company, a corporation organized and existing under and by virtue of the laws of the state of California, with its principal place of business in the city of El Centro, county of Imperial, state of California,

and in the southern division of the southern district of California.

And for its cause of action plaintiff states:

1. That this suit is one between citizens and residents of different states, in that at the time of the commencement of this suit the plaintiff is a corporation organized and existing under and by virtue of the laws of the state of Utah, with its principal place of business in the city of Salt Lake, state of Utah, and is a resident of said state of Utah; the defendants Friend J. Austin, Lettie M. Austin, William Martin Belford and Annie Marie Belford are citizens of the state of California and residents of the county of Imperial, in the state of California; The Peoples Abstract & Title Company is a corporation organized and existing under and by virtue of the laws of the state of California, with its principal place of business in the city of El Centro, county of Imperial, state of California, and is a resident of said county of Imperial, state of California.

2. That the amount in controversy herein exceeds the sum of $3,000.00, exclusive of interest and costs.

3. That the Delta Land & Water Company is now, and was during all the times herein mentioned, a corporation organized and existing under and by virtue of the laws of the state of Nevada.

4. That on or about the first day of January, 1916, in the county of Beaver, state of Utah, the said defendants Friend J. Austin and Lettie M. Austin, his wife, for a valuable and adequate consideration, made and executed their joint and several promissory

note, in writing, bearing date on that date in words and figures as follows, to wit:

"$55,000.00 Milford Utah, Jan. 1, 1916.

For value received, we jointly and severally promise to pay to Delta Land & Water Company, or order, at its office in Milford, Beaver County, Utah, Fifty-five Thousand Dollars, in installments, as follows:

$ 5,000 on or before three years after date
5,000 on or before four years after date
5,000 on or before five years after date
5,000 on or before six years after date
5,000 on or before seven years after date
10,000 on or before eight years after date
10,000 on or before nine years after date
10,000 on or before ten years after date

together with interest, payable annually on January first of each year, commencing with the year 1917, on each and all of said installments, at the rate of six per cent. per annum from date hereof until maturity. If any installment of principal or interest be not paid at maturity thereof, such installment, together with interest then due thereon, shall bear interest from maturity thereof until paid at the rate of eight per cent. per annum. If default be made, and continue for thirty days, in the payment of any installment of principal or interest, or any part thereof, the entire unpaid principal of this note and all accrued interest thereon shall become immediately due and payable at the option of the legal holder hereof. If suit be

brought for the collection of this note, we agree to pay a reasonable attorney's fee in addition to the amount hereinbefore mentioned, which we agree shall be taxed as part of the costs of the suit and included in any judgment rendered in the action.

Friend J. Austin
Lettie M. Austin.

(I. R. S. $11.00 affixed to
original and cancelled.)"

and then and there delivered the same to the said Delta Land & Water Company.

5. That the said defendants Friend J. Austin and Lettie M. Austin, his wife, to secure the payment of the said principal sum and interest thereon as mentioned in said promissory note, according to the tenor thereof, and as part of the same transaction, did at said time and place execute under their hands and seals and deliver to The Peoples Abstract & Title Company, defendant, for the benefit of the said Delta Land & Water Company, a certain trust deed and mortgage also bearing date on the first day of January, 1916, which said trust deed and mortgage is in words and figures as follows, to wit:

THIS INDENTURE made this 1st day of Jany., 1916, between Friend J. Austin and Lettie M. Austin, his wife, of Beaver County, Utah, hereinafter called "first parties", Delta Land & Water Company, a corporation organized under the laws of Nevada, hereinafter called "second party", and the Peoples Abstract

& Title Co., a corporation organized under the laws of California, hereinafter called the "Trustee",

WITNESSETH: That

WHEREAS, at the date hereof first parties are indebted in various amounts, including certain indebtedness now owing by them to second party, and also desire to secure from second party, from time to time hereafter, such further amount or amounts as they may require for the improvement, equipment and stocking of their farm in Beaver County, Utah, all of which indebtedness first parties desire to consolidate in the form of one secured loan not exceeding in principal amount the sum of Fifty-five Thousand Dollars, and

WHEREAS, in consideration of its agreement to advance them funds with which to pay their present indebtedness to said Delta Land & Water Co. and certain other indebtedness secured by mortgage on part of the property described in the trust deeds hereinafter mentioned, as well as to advance them such further amounts as they may require for said purposes, not exceeding in principal amount the sum aforesaid, first parties have, contemporaneously with the execution hereof, executed and delivered to second party their joint and several note for the full principal sum of Fifty-five Thousand Dollars in words and figures following, viz:

"55,000.00 Milford, Utah, Jan. 1, 1916.

For value received, we jointly and severally promise to pay to Delta Land & Water Company, or order, at its office in Milford, Beaver County,

Utah, Fifty-five Thousand Dollars in installments as follows:

$ 5,000 on or before three years after date
5,000 on or before four years after date
5,000 on or before five years after date
5,000 on or before six years after date
5,000 on or before seven years after date
10,000 on or before eight years after date
10,000 on or before nine years after date
10,000 on or before ten years after date

together with interest, payable annually on January first of each year, commencing with the year 1917, on each and all of said installments, at the rate of six per cent. per annum from date hereof until maturity. If any installment of principal or interest be not paid at maturity thereof, such installment, together with interest then due thereon, shall bear interest from maturity thereof until paid at the rate of eight per cent per annum. If default be made, and continue for thirty days, in the payment of any installment of principal or interest, or any part thereof, the entire unpaid principal of this note and all accrued interest thereon shall become immediately due and payable at the option of the legal holder hereof. If suit be brought for the collection of this note, we agree to pay a reasonable attorney's fee in addition to the amount hereinbefore mentioned, which we agree shall be taxed as part of

the costs of the suit and included in any judgment rendered in the action.

Friend J. Austin
Lettie M. Austin.

(I. R. S. $11.00 affixed to)
(original and cancelled)

and

WHEREAS, first parties are desirous of securing not only the prompt payment of any and all amounts which may at any time be due and owing by them on said note, but also of effectually securing and indemnifying second party for or on account of any assignment, endorsement or guarantee which it may make of or concerning said note.

NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar to them in hand paid by the Trustee, receipt of which by them is hereby acknowledged, first parties have granted, bargained, sold, conveyed, assigned and transferred, and do hereby grant, bargain, sell, convey, assign and transfer, unto said The Peoples Abstract & Title Co., as Trustee, its successors-in-trust and assigns, the following described premises, situate in Imperial County, California, to wit:

The east one-half of Section Twenty, Township Twelve South, Range Fourteen East, San Bernardino Meridian; containing 320 acres, more or less;

together with 300 shares of the capital stock of Imperial Water Company No. 3, a corporation organized under the laws of California, evidenced by Certificates

Nos. 149 and 463 for 150 and 150 shares, respectively, which by the terms of said certificates and the By-Laws of said Water Company, are appurtenant to the lands aforesaid.

TO HAVE AND TO HOLD the same, together with the improvements, appurtenances and privileges thereunto belonging or in any wise appertaining, unto the said Trustee, its successors-in-trust and assigns, forever, but

IN TRUST, NEVERTHELESS, as security for the payment of their promissory note aforesaid and such further amounts as second party or said Trustee may expend in protecting the title to said property or any part thereof under the provisions of this Indenture.

PROVIDED, HOWEVER, and this Indenture is made on the express condition, that if first parties, their heirs or assigns, shall pay said note, according to its tenor, and any and all other indebtedness secured hereby, as required by said note and this indenture, and shall keep, perform and observe all and singular the covenants and agreements in said note and this Indenture expressed, by them to be kept, performed and observed, the estate and rights granted, bargained, sold, conveyed, assigned and transferred by this Indenture shall immediately cease and terminate, but otherwise shall remain in full force and effect; and

PROVIDED FURTHER, that while not in default as to the payment of the principal or interest of the note aforesaid, or as to any of their covenants herein contained, first parties shall have the right and be permitted to hold and possess said property and the

appurtenances and privileges thereunto belonging, and to collect and use the income, rents, profits and returns thereof, except as herein expressly provided.

FIRST PARTIES further covenant and agree as follows:

First: That at the time of the execution of this Indenture they are lawfully seized and possessed of all and singular the premises and shares of stock aforesaid in fee simple, and have good right, full power and lawful authority to grant, bargain, sell, convey, assign and transfer the same in manner and form aforesaid, hereby fully and absolutely waiving and releasing all rights and claims which they or either of them may have in or to said premises or any part thereof, as a homestead exemption, under and by virtue of any law of the State of California now existing or which may hereafter be enacted by the legislature of the State of California in relation to homestead exemptions, and that the same are free and clear of all liens and encumbrances whatsoever, except a certain mortgage executed by the grantors herein in favor of the Pacific Mutual Life Insurance Co. to secure a promissory note executed by the grantors herein for Six Thousand Dollars recorded at page 57 of Book 35 of the official records of said Imperial County and covering the NE¼ of said section 20 Township 12 South Range 14 East San Bernardino Meridian and 150 shares of the capital stock of the Imperial Water Co. No. 3 evidenced by Certificate No. 463 which said certificate is now pledged with and held by said Pacific Mutual Life Insurance Co.

Second: That they will pay all taxes levied on said premises at or before the time the same become delinquent by law, and also all assessments which may be made or levied upon said stock, or any part thereof, at or before the time the same become delinquent by law or by the terms and provisions of the By-laws of said Imperial Water Company No. 3; that they will keep all buildings which may at any time be on said premises (until the indebtedness evidenced by said note is paid in full) insured in such company or companies as the holder of said note may from time to time direct, to the extent of the insurable value thereof, not exceeding the amount of said indebtedness (provided first parties shall have the right to insure such improvements for a greater sum if they desire so to do), and will assign and deliver the policy or policies issued for such insurance to the legal holder of said note as further security for the payment of same; and that in case of refusal or neglect on their part to insure the improvements on said premises, or to assign or deliver such policies of insurance, or to pay such taxes or assessments, then the Trustee herein or the then legal holder of said note, or either of them, may procure such insurance or pay such taxes or assessments, and all moneys thus paid, with interest thereon from date of payment at eight per cent. per annum, shall become so much additional indebtedness secured by this Indenture, and shall be paid from the proceeds of the lands and stock aforesaid, if not otherwise paid by first parties.

Third: That in case default shall be made by first parties in the payment of said note or of any install-

ment thereof, or in the payment of interest thereon, according to the tenor and effect of said note, and such default shall continue for a period of thirty days, or in case first parties shall make default in the performance of any other covenant herein contained by them to be kept and performed, and such default shall continue for a period of thirty days after written notice of such last mentioned default and demand for performance of such covenants shall have been mailed to them by the Trustee, or the then legal holder of said note, addressed to them at Milford, Utah, second party, or the then legal holder of said note, shall have the right, at its or his option, to declare all of the indebtedness secured hereby to be immediately due and payable, —anything in said note or this Indenture to the contrary notwithstanding, and upon notice and demand in writing, filed with the Trustee by second party, or the then legal holder of said note, that second party, or such legal holder, has declared a breach of this Indenture and has elected to advertise said premises for sale and demanding that the said Trustee shall sell said premises pursuant to the terms and provisions of this Indenture, it shall be lawful for the said Trustee to sell and dispose of the said premises and stock en masse or in separate parcels as the Trustee may think best, and all right, title and interest of first parties, their heirs or assigns, therein, at public auction, at the front door of the County Court House in El Centro, Imperial County, California, or on said premises or any part thereof as may be specified in the notice of such sale, for the highest and best price that the same will bring in cash, after giving not less than

four weeks' public notice of the time and place of such sale by weekly advertisement in some newspaper of general circulation in said Imperial County, California, —a copy of which printed notice, so soon as printed, shall be mailed to first parties at Milford, Utah, and to all subsequent encumbrancers of the premises to be sold, at the addresses given in the recorded instruments evidencing their several encumbrances, and to execute and deliver to the purchaser or purchasers of such lands and stock at such sale or sales a deed or deeds for the lands and premises sold, and such assignment or other transfer as may be necessary to vest the title to the said premises and stock in the purchaser or purchasers and their assigns, which said deed or other transfer shall be in the ordinary form of conveyance and shall be signed, acknowledged and delivered by the said Trustee, as grantor, and shall convey and quit-claim to the person or persons entitled to such deed or deeds, as grantee or grantees, the lands and stock sold as aforesaid and all the right, title, interest, benefit and equity of redemption of first parties, their heirs and assigns therein; and such deed or deeds shall recite the amount for which the said lands and stock conveyed thereby were sold and shall refer to the power of sale herein contained and the sale or sales made by virtue hereof; but the notice of such sale need not be copied into such deed or deeds; and the said Trustee, out of the proceeds of such sale, after first paying and retaining its reasonable charges and costs of advertising the land and stock for sale and selling the same, shall pay to second party, or the then legal holder of said note, the principal and interest due

thereon, according to its tenor and effect, and all moneys advanced by the Trustee or by the legal holder of said note for insurance, taxes or assessments, with interest thereon at the rate aforesaid, and shall render the surplus, if any, unto the said first parties, their legal representatives or assigns. The recitals of fact contained in such deeds shall be conclusive evidence of the facts therein recited, and the sale or sales and deed or deeds so made and executed by the Trustee shall be a perpetual bar, both in law and in equity, against first parties, their heirs and assigns and all other persons claiming the premises and stock aforesaid or any part thereof under, from or through first parties or either of them. The legal holder of said note, at the time of sale of said premises by the Trustee, may purchase said property or any part thereof, and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase money. In case an action is brought in any court of competent jurisdiction to foreclose this Indenture, second party, or the then legal holder of said note, may have a receiver appointed in said action, as a matter of right, to take immediate possession of said premises, and to cultivate the same as well as to use the water to which first parties, as the owners of said stock, may be entitled for the irrigation of said lands, and to harvest and market the crops raised thereon and to collect the rents, issues and profits thereof for the use and benefit of the then legal holder of said note, pending such foreclosure and during the period of redemption allowed by law to first parties or subsequent encumbrancers of said premises.

IN CONSIDERATION of the premises and of the foregoing covenants of first parties, second party agrees that in the event it does not advance to first parties the full principal sum of Fifty-five Thousand Dollars, including their present indebtedness to it as aforesaid, it will not assign, endorse or hypothecate said note without first endorsing thereon the difference between the principal amount of said note and the principal amount of the advancements which at the time of such assignment, endorsement or hypothecation it shall have made to first parties, and that at the end of each annual period it will endorse and credit upon said note the interest on the difference between the principal amount of said note and the principal amount of first parties' actual indebtedness to it, at the rate specified in said note.

AND IN CONSIDERATION of the conveyance made to it as aforesaid and of the covenants of first parties herein contained, the Trustee accepts the trust created by the execution and delivery of this Indenture and agrees to perform the duties devolving upon it as hereinbefore set forth; provided, however, that by accepting such trust the Trustee does not assume any responsibility in respect to the sufficiency of this Indenture, the title of first parties to the premises or stock herein described or any part thereof, nor shall it be obligated to see to the recording of this Indenture nor to take any action in court or otherwise for the purpose of protecting its title to said lands and stock or any interest of second party or the legal holder of said note therein, nor shall it be obligated to

exercise its power of sale hereunder unless it be fully indemnified by second party, or the then legal holder of said note, in such reasonable manner and amount as it may require to insure the payment of its proper charges for such services and against any and all loss and expense which it may incur in so doing.

IN WITNESS WHEREOF, first parties have hereunto subscribed their names and affixed their seals, and second party and said Trustee have hereunto caused their corporate names to be subscribed by their respective Vice-Presidents thereunto duly authorized and their seals to be affixed by their respective secretaries, the day and year first above written.

(SEAL D. L. FRIEND J. AUSTIN (SEAL)
& W. Co.) LETTIE B. Austin (SEAL)
Attest: DELTA LAND & WATER COMPANY
H. B. Prout By Geo. A. Snow,
Secretary. Its Vice-President.
THE PEOPLES ABSTRACT & TITLE CO.
Attest: By Philo Jones,
W. H. Lovayea Its Vice-President.
(SEAL P. A.
& T CO.)

STATE OF *BEAVER*)
) SS
COUNTY OF BEAVER)

On this 7th day of February, 1916, before me, G. P. Holmes, a Notary Public in and for said County State, residing therein, duly commissioned and sworn, personally appeared Friend J. Austin and Lettie M. Austin, his wife, known to me to be the persons whose

names are subscribed to the within instrument, and acknowledged to me that they had executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

G. P. Holmes

Notary Public in and for the County of Beaver, State of Utah.

My commission expires May 25, 1919.

State of Utah,)
) ss.
County of Salt Lake.)

On this 19th day of February, 1916, before me, A. E. Burdette, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared George A. Snow, known to me to be the Vice-President of Delta Land & Water Company, one of the corporations that executed the within instrument, and the said George A. Snow acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

A. E. Burdette

Notary Public in and for Salt Lake County, State of Utah.

My commission expires Nov. 2, 1917.

STATE OF CALIFORNIA,)
) ss.
County of Imperial.)

On this 3rd day of March, in the year one thousand nine hundred and sixteen, before me, J. J. Simmons, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Philo Jones, known to me to be the Vice-President of The Peoples Abstract & Title Company, one of the corporations that executed the within instrument, and the said Philo Jones acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

J. J. Simmons
Notary Public in and for Imperial County, State of California.

My commission expires April 19, 1917.

[Endorsed]: Recorded at request of The Peoples Abstract and Title Company Mar. 30, 1916, at 20 Min. Past 8 A. M. in Book 107, Page 351 of Deeds Imperial County Records FRANK ERZINGER, County Recorder By 80 Deputy. Fees $3.00

That said trust deed and mortgage was also signed by the Delta Land & Water Company and by The Peoples Abstract & Title Company on or about the said first day of January, 1916, and the said trust deed and mortgage was duly executed and certified by all of the parties executing the same, so as to entitle it to be recorded, and the said trust deed was afterwards, to wit, on the 30th day of March, 1916, duly recorded in

the office of the county recorder of the county of Imperial, state of California, in book 107 of deeds, page 351.

6. That the said defendants Friend J. Austin and Lettie M. Austin, his wife, as further security for the payment of the principal sum and interest mentioned in their aforesaid promissory note of January 1, 1916, according to the tenor thereof, and as part of the same transaction, did at the same time and place transfer and assign to the Delta Land & Water Company that certain promissory note of the defendant Annie Marie Belford, dated June 20, 1914, in the principal sum of $10,000.00, due five years after date, payable to the defendant Friend J. Austin, bearing interest at the rate of eight per cent per annum, payable semi-annually, and the mortgage of the said defendant Annie Marie Belford securing said promissory note, which said note and mortgage were, and are, in words and figures as follows, to wit:

-: REAL ESTATE MORTGAGE :-

Short form.

THIS MORTGAGE, made this Twentieth day of June in the year nineteen hundred and Fourteen by Annie Belford of Alamorio, California, Mortgagor to Friend J. Austin of Calipatria, California, Mortgagee, WITNESSETH: That

The Mortgagor mortages to the Mortgagee the real property situate in the County of Imperial, State of California, and described as follows, to wit:

Northeast Quarter of Section 8, Tp. 14 South, R. 16 East, S. B. M. 160 acres according to plat

of Survey approved Oct. 18, 1856, being Southwest Quarter of the Northeast Quarter, Southeast Quarter of the Northwest Quarter, Lots 8 and 10, Sec. 3, Tp. 14 South, R. 16 East, S. B. M., California, containing 141.95 acres, according to plat of resurvey approved Nov. 4, 1908, together with one hundred and thirty-four (134) shares of the capital stock of Imperial Water Co. #5 evidenced by certificate #2303 of said Imperial Water Co. #5.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

AS SECURITY for the payment of One Promissory Note, of which the following is a true copy, to-wit:

"10,000.00 June 20th, 1914.

Five years after date, for value received, I, Annie Belford promise to pay to Friend J. Austin, or order, at The First National Bank at Brawley, California, the sum of Ten Thousand ($10,000.00) Dollars with interest at the rate of eight per cent. per annum from date until paid, interest payable semi-annually, and, if not so paid, to be compounded semi-annually and bear the same rate of interest as the principal; and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States.

ANNIE BELFORD"

AND THE MORTGAGOR promises to pay said note according to the terms and conditions thereof, and in case of default in the payment of the same, or of any installment of interest thereon when due, the Mortgagee, his heirs or assigns, may declare the whole debt immediately due and payable, and may foreclose this mortgage, and may include in such foreclosure a reasonable counsel fee, to be fixed by the court, together with all payments made by the Mortgagee for taxes and assessments on said premises, including taxes on the interest of the Mortgagee therein by reason of this mortgage; and for insurance of the buildings on said premises paid by the mortgagee, and for any adverse claims to the mortgaged property paid by mortgagee, as well as the cost of searching title to the mortgaged premises, subsequent to the execution hereof, all of which payments the mortgagee is hereby authorized to make, and the same with interest thereon at the same rate as provided in said Promissory Note, together with said counsel fees, are secured by this Mortgage, and payable to the Mortgagee, his heirs or assigns, in United States gold coin, out of the proceeds of sale under said foreclosure.

WITNESS the hand and seal of the Mortgagor.

ANNIE BELFORD (SEAL)

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

__________________________________.

STATE OF CALIFORNIA,)
) ss.
County of Imperial.)

ON THIS 20th day of June in the year nineteen hundred and Fourteen, before me Earl C. Pound, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared Annie Belford, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

WITNESS my hand and official seal.

(SEAL) EARL C. POUND

Notary Public in and for said County of Imperial, state of California.

- - - - - - - - - - -

No. 56

MORTGAGE

Short form.

Order No.———

When recorded, please mail this instrument to

Friend J. Austin
Calipatria, Calif.

Annie Belford, Alamorio,
California,

to

Friend J. Austin, Calipatria, Calif.

Dated June 20th, 1914.

Recorded at request of First National Bank Imperial, June 22, 1914, at 36 min. past 2 P. M. in Book 30, Page 142, et seq. of Mortgages, Imperial County records.

JOHN NORTON,
County recorder.

By..
Deputy.

Fees $1.30. Indexed, compared.

That the aforesaid mortgage of the defendant Annie Marie Belford to the defendant Friend J. Austin was recorded on June 22, 1914, in book 30, page 142, et seq, of mortgages, Imperial county records, California.

7. That said defendants Friend J. Austin and Lettie M. Austin, his wife, as further security for the payment of the principal sum and interest mentioned in their aforesaid promissory note of January 1, 1916, according to the tenor thereof, and as part of the same transaction, did, at the same time and place, transfer and assign to the Delta Land & Water Company that certain promissory note of one Joseph Carrick, dated March 3, 1915, for the principal sum of $12,000.00, payable to the order of Friend J. Austin five years after date, with interest at eight per cent per annum, payable semi-annually, and a mortgage of the said Joseph Carrick, as mortgagors, in favor of Friend J. Austin, as mortgagee, upon the southwest quarter of section 4, township 12 south, range 15 east, San Bernardino Meridian, in Imperial County, California, and 150 shares of the stock of Imperial Water Company No. 3, issued to the said Joseph Carrick, and assigned by said Joseph Carrick to the said Friend J. Austin, which said mortgage is recorded on page 183, book 35 of mortgages in said Imperial county records.

8. That thereafter and on or about the 5th day of March, 1917, the Frances Investment Company, plaintiff herein, in due course of business, for a valuable and adequate consideration, and prior to maturity, purchased and acquired of and from the Delta Land & Water Company, and the Delta Land & Water Company at said time endorsed, transferred and assigned to the plaintiff, the aforesaid promissory note exe-

cuted on January 1, 1916, by Friend J. Austin and Lettie M. Austin, and also the aforesaid promissory note and mortgage of the defendant Annie Marie Belford, dated June 20, 1914, and the aforesaid promissory note and mortgage of Joseph Carrick, dated March 3, 1915, and ever since said 5th day of March, 1917, the plaintiff has been, and now is, the lawful owner and holder of said promissory notes and each of them. That on or about the date of the assignments thereof to it, as aforesaid, the plaintiff duly notified the said Annie Marie Belford and Joseph Carrick that their respective notes and mortgages had been sold and assigned to it, and on or about the 30th day of November, 1917, the plaintiff notified the defendant The Peoples Abstract & Title Company in writing that the aforesaid promissory note of the defendants Friend J. Austin and Lettie M. Austin had been assigned to it, and that it, the plaintiff, was the lawful owner and holder of same. That on the 30th day of November, 1917, the plaintiff caused to be recorded in book 5, page 1, of assignments, Imperial county records, California, the assignment by the Delta Land & Water Company to the plaintiff of the aforesaid promissory note and mortgage of the defendant Annie Marie Belford hereinbefore set forth, and on the 30th day of November, 1917, caused to be recorded in book 5, page 2, of assignments, Imperial county records, California, the assignment by the Delta Land & Water Company to the plaintiff of the aforesaid note and mortgage of Joseph Carrick.

9. That no part of the principal of said promissory note of the defendants Friend J. Austin and Lettie M. Austin has been paid, and no part of the interest of said

note has been paid, except the sum of $1965.45, which was paid on account of such interest at or about the time of the purchase of said note by the plaintiff, in consequence whereof this plaintiff has elected to, and hereby does, declare the principal of said note, together with all accrued and unpaid interest thereon to be now due and payable.

10. That no part of the principal or interest of said promissory note of the defendant Annie Marie Belford has been paid except the interest thereon to July 20, 1917; in consequence whereof the plaintiff has elected to, and hereby does, declare the principal of said note, together with the interest thereon from the 20th day of July, 1917, to be now due and payable.

11. That on the second day of October, 1917, the defendants Friend J. Austin and Lettie M. Austin, and the defendants William Martin Belford and Annie Marie Belford, with intent and design to cheat and defraud the plaintiff out of its security afforded by the aforesaid trust deed of date January 1, 1916, and to cheat and defraud the plaintiff out of the lien of the aforesaid mortgage of the defendant Annie Marie Belford, did file their verified petition in the office of the clerk of the superior court of the county of Imperial, state of California, praying for a decree of said court directing the registration of title under the terms and conditions of that certain law enacted by the people of the state of California, adopted and passed at the general election held on November 3, 1914, entitled "An Act to Amend an Act entitled, 'An Act for the Certification of Land Titles and the Simplification of the Transfer of Real Estate', approved

March 17th, 1897", of the real estate described in said petition, including the east one-half of section twenty, township 12 south, range 14 east, S. B. M., described in the aforesaid trust deed and mortgage of date January 1, 1916, and also including the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter, lots 8 and 10, section 3, township 14 south, range 16 east, S. B. M., as described in the aforesaid mortgage of the defendant Annie Marie Belford of date June 20, 1914, which said verified petition was in words and figures as follows, to-wit:

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF IMPERIAL.

IN THE MATTER OF THE APPLICATION OF FRIEND JAMES AUSTIN, LETTIE MARY AUSTIN, WILLIAM MARTIN BELFORD and ANNIE MARIE BELFORD FOR INITIAL REGISTRATION OF TITLE TO LAND.	No. 7 PETITION.

TO THE HONORABLE JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF IMPERIAL:

Your applicants hereby make application to have registered the title to the land hereinafter described,

as provided by that certain law enacted by the people of the State of California, adopted and passed at the General Election held on November 3rd, 1914, entitled "An Act to Amend an Act Entitled "An Act for the Certification of Land Titles and the Simplification of the Transfer of Real estate' Approved March 17th, 1897", and in that connection allege:—

I.

That as applicants are informed and believe, and therefore allege, there is no person who has any estate, or claim any interest in the, or any part of the, land hereinafter described other than as stated herein, in law or equity, in possession, remainder, reversion or expectancy; that applicants are free from any and all disabilities.

II.

That none of the property is subject to a homestead, and none is subject to any easement, lien, or encumbrance, unless and except as hereinafter specifically stated. That except as hereinafter specifically stated addresses given are the post office addresses of the parties in question, and where land is occupied that fact is specifically stated herein, and the full name and post office address respectively of each occupant and what interest he has, or claims, is stated, and said occupants have no other or further interest in the property other than as hereinafter stated. That all of the property is community property, that all of the property is located in the County of Imperial, State of California; that the value at which the land and the permanent improvements thereon were assessed on the last assess-

ment for County taxation are stated for each separate parcel of property; that whenever records are hereinafter referred to, said records are those in the office of the County Recorder of Imperial County, California, unless otherwise specifically stated; that applicants claim no part of the land within the limits of any ways designated on the maps hereinafter referred to, other than a reversionary interest therein, and that they do not desire to have the lines of said ways determined.

III.

That applicants' title to the respective parcels of said land as hereinafter set out, is perfect of record in the office of the County Recorder of said County; that title was obtained thereto by deeds, and that applicants have ever since owned said land and have not conveyed or encumbered the same except as stated herein; that applicants and their predecessors in interest have been in the actual, exclusive and adverse possession of the land herein described continuously for more than five years next preceding the filing of this petition, as the owners in fee simple, claiming to own the same against the world, and have paid all taxes of every kind legally levied or assessed against such property during said period; that the character of such possession is hereinafter specifically described; and the applicants have made, or caused to be made, diligent search and inquiry as to the owners, and their post office addresses, of the adjoining lands to those sought to be registered herein; that all such names and post office addresses are hereinafter set forth, in so far as they were, after diligent search and inquiry, disclose; that such search

and inquiry was made both in the neighborhood where said lands are located and also at the office of the County Assessor and County Tax Collector of said County, and all other places likely to acquaint applicants with such names and post office addresses; that your applicants verily believe that all such names and post office addresses are given in so far as the same can be ascertained by diligent inquiry.

IV.

That applicants FRIEND JAMES and LETTIE MARY AUSTIN are husband and wife; that their occupations are farmer and housewife, respectively; that their ages are sixty years and fifty-five years, respectively; that their residence and post office address is Calipatria, California; that the description of the land for which registration of title is prayed is;

Parcel 1: All of the East Half (E½) of section twenty (20), township twelve (12) south, range fourteen (14) east, San Bernardino Meridian, California, except a strip one hundred (100) feet wide therethrough owned by the Inter-California Railway Company and more particularly described in deed recorded in Book 117 of Deeds, at Page 86, Imperial County Records; map on file in the office of the county recorder; assessed valuation, $10,700.00.

That applicants claim an estate in fee simple in said land, as their community property; that as regards improvements and occupancy by applicants and their predecessors in interest during the five years last past, said land has been improved by levelling, irrigation and cultivation, and by the erection of buildings, and is now occupied by applicants.

That the names and post office addresses of the owners of adjoining lands are:

Inter-California Railway Company, a corporation, San Francisco, California; Ira Aten, El Centro, California; Title Insurance and Trust Company, Los Angeles, California (a corporation) C. I. Whitesell, Los Angeles, California;

That Parcel 1. of said land is subject to:

1. A right of way for an irrigation system and telephone lines over any part of said land, in favor of Imperial Water Company No. 3, a corporation, of Calipatria, California; recorded in Book 91, page 222 of deeds.

2. A mortgage of the North half (N½) of said land, being the Northeast Quarter (NE¼) of said section twenty (20), dated February 16, 1915, recorded in Book 35, page 57, of Mortgages, given to secure the payment to The Pacific Mutual Life Insurance Company of California, a corporation of Los Angeles, California, of a promissory note of even date for Six Thousand ($6000.00) Dollars, payable five years after date, with interest at eight per cent per annum, payable semi-annually.

Parcel 2: The Southwest Quarter (SW¼) of Section Four (4), Township Twelve (12) South, Range Fifteen (15) East, San Bernardino Meridian, California; map on file in the office of the County Recorder; assessed valuation, $5000.00.

That applicants claim an estate in fee simple in said land, as their community property; that as regards improvements and occupancy by applicants and their

predecessors in interest during the five years last past, said land has been improved by levelling, irrigation and cultivation, and by the erection of buildings, and is now occupied by Stephen A. Shepp, Calipatria, California, as tenant under written lease.

That the names and post office addresses of the owners of adjoining lands are:

Victor W. Bailey, 580 North Michigan Avenue, Pasadena, California; Lily G. Uzzell, 6100 Converse Street, Los Angeles, California; C. I. Whitesell, Los Angeles, California.

That Parcel 2 of said land is subject to:

1. A right of way for ditches, canals and telephone lines in favor of Imperial Water Company No. 3, a corporation, of Calipatria, California, as per deed recorded in Book 89 of deeds, at page 11.

2. An unrecorded lease, in favor of Stephen A. Shepp, of Calipatria, California, which expires January 1, 1919.

That the Delta Land and Water Company, a corporation of Milford, Utah, claims some right, title or interest in and to the lands above described as Parcel One, by virtue of a certain mortgage executed by Friend James Austin and Lettie Mary Austin, (hereinafter referred to as plaintiffs), on July 10th, 1914, and recorded September 24th, 1914, in Book 32, of Mortgages, at page 169; and a certain trust deed made and executed by plaintiffs on January 1st, 1916, to Peoples Abstract and Title Company, a corporation, of El Centro, California, and recorded March 30, 1916, in book 107, of deeds, at page 351, said trust deed being given

to secure the payment to said Delta Land and Water Company of a promissory note, of even date, for fifty-five thousand ($55,000.00) dollars, and that said Delta Land & Water Company claims some right, title and interest in and to the land above described as Parcel Two by virtue of an assignment to said Company of a certain mortgage, said assignment being recorded in Book 4, of Assignments of Mortgages, at Page 113; that all the claims of said Delta Land and Water Company are without right, and void, and in that connection plaintiffs allege:

V.

That *that* defendant Delta Land and Water Company (hereinafter referred to as Delta Company) is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Nevada, having an authorized capital stock of 100,000 shares of a par value of $1.00 each, and doing business in the States of Utah and California; that at all times herein mentioned said Delta Land and Water Company was engaged in the business of buying and selling parcels of certain tract of land comprising about 15,000 acres, on the Beaver River, and adjacent to the Town of Milford, in Milford Valley, in the County of Beaver, State of Utah, and in colonizing said tract by procuring and inducing purchasers of parcels thereof to settle and live thereon, and in selling the capital stock of a certain corporation known as the Beaver County Irrigation Company (hereinafter referred to as Irrigation Company), and on or about July 10, 1914, said Delta Company was

engaged in the construction of a dam and reservoir on said Beaver River at a point in said river above the place where said river flows through said 15,000 acre tract, and in the construction of canals and ditches upon said tract for the distribution thereon of water from said river; that prior to the construction of said dam and reservoir said Beaver River flowed and took a course past and contiguous to the town of Adamsville in said Beaver County, and thence past and contiguous to the town of Minersville in said County, and thence through said 15,000 acre tract, and along the contiguous to the boundaries of said town of Milford, and thence through and beyond said Milford Valley; that ever since the construction of said dams and reservoir said river has continued to flow in and take the course above described. Plaintiffs are informed and believe, and upon such information and belief allege, that said Irrigation Company, a corporation, was organized and incorporated on or about April 30, 1913, by W. I. Moody, and other persons who were then officers of said Delta Company, and whose names are to plaintiffs unknown and has ever since existed under, and by virtue of the laws of the State of Utah, with an authorized capital stock of 15,000 shares of stock known as Class "A" of the par value of $1.00 per share, and 15,000 shares of stock known as Class "B" of the par value of $1.00 per share; that upon completion of the aforesaid dam and reservoir and distributing system said Delta Company sold the same to said Irrigation Company, and received therefor all of the capital stock of said Irrigation Company.

VI.

That on and prior to said July 10, 1914, at and in the County of Imperial, State of California, the defendant Delta Company falsely and fraudulently stated to the plaintiffs, as facts, that said Delta Company then owned 15,000 acres of fertile land in the tract adjoining the town of Milford in Milford Valley, in Beaver County, State of Utah, which is the same land described in paragraph V hereof, and of which the parcel of land hereinafter described in paragraph VII hereof is a part; that all of said tract, and particularly said parcel thereof, which is hereinafter described in paragraph VII, was then the richest type of soil found in the western part of the United States, and was rich, responsive, loamy soil, and of the best quality, fertile in every respect, free from alkali and noxious weeds, and suitable for and adapted to growing, and that there could be grown thereon, large crops of alfalfa, wheat, oats, barley, potatoes, sugar beets, asparagus, celery, onions, apples, pears, plums, cherries, and other small fruit, and kinds of garden truck; that said soil had been analysed and tested by experts in the employ of said Delta Company, and that its fertility had been by them established beyond all question; that said valley possessed a climate that produced bumper crops and had a long, even growing season, and warm, open winters; that with each acre of said land the defendant Delta Company would sell one share of the "Class "A" capital stock of the said Irrigation Company, and said defendant would not sell, or permit to be sold, and that they had not sold, and that they could not sell, a share

of said stock except in conjunction with the sale of an acre of said land; that each share of said stock entitled the holder thereof to one-fifteen-thousandth part of the water supply of said Irrigation Company to be used upon the acre of ground sold in conjunction with such share of stock as aforesaid; that the dam and reservoir and distributing system in paragraph V above described as then owned by said Irrigation Company was a million dollar system, and the construction thereof had cost one million dollars; that the said dam had a cement core running across and through it to bed rock; that said Irrigation Company then owned and was entitled to the use of all of the flow of water in said Beaver River, except 7500 acre feet per annum which was to be delivered to certain lands in said town of Minersville from an intake on said Beaver River at said town of Minersville, together with two cubic feet per second of water to be taken from below the aforesaid reservoir and above said point of diversion at Minersville for domestic and culinary uses the non-irrigation season, under a perpetual first right to the use of said quantities of water from the flow of said river, and all of said flow of water (except said quantities above excepted) then was owned outright and without restriction and entirely controlled by said Irrigation Company; that the flow of water in said Beaver River had been, and was, and would be *ex*-haustible, and the amount thereof owned and controlled by said Irrigation Company as aforesaid had been, and was, and would be sufficient to furnish all necessary water for irrigating said 15,000 acres for

the growing of the aforesaid crops thereon, and that it furnished, and had furnished, and would furnish an average each and every year of not less than three acre feet of water per acre for each and every acre of said 15,000 acre tract; that none of said flow of water so owned and controlled by said Irrigation Company had been, or would, or could be sold or made appurtenant to or diverted to any other land or lands than the said 15,000 acre tract; that all of said flow of water so owned and controlled by said Irrigation Company was, and would be equally pro rated every year to each and every acre of said 15,000 acre tract; that the portion of said water to which each and every acre of said land, together with the share of said stock purchased therewith, was then entitled and would receive, was not less than three acre feet annually; that a record and survey of the flow of water in said Beaver River at said town of Minersville, Beaver County, Utah, had been made and kept by the United States government for each year during fourteen years immediately preceding said July 10, 1914, and said record showed there had been during fourteen years, and was, on or about July 10, 1914, an average flow of water in said river sufficient to fully irrigate 45,000 acres of such land as that in the above described 15,000 acre tract for the raising thereon of large and profitable crops of the hay, grain, vegetables, fruits and other products above named, each and every year; that with the water rights of said Irrigation Company in said river, together with its dam, reservoir, and distributing system, the purchasers of said 15,000 acre tract,

and of parcels thereof, had and would have an inexhaustible supply of water for use on said land at all times, without cost or charge for the water, except the cost of maintaining the said water system, and such cost should not and would not exceed thirty cents per acre per year; that the whole of said 15,000 acre tract was intended by said defendants to be sold, and said defendant would sell the same, and the whole thereof, in parcels, and upon a plan to make said tract, and the whole thereof, a large and prosperous farming colony with said irrigation system devoted to such development of said tract upon said plan and for exclusive use upon said tract, and said defendant would greatly increase the value of said tract for the purchasers thereof, and particularly of said parcel, in Paragraph VII described, for the plaintiffs, by such development of the whole of said tract; that the soil in said 15,000 acre tract, and particularly the soil in the parcel thereof described in Paragraph VII herein, was then especially adapted to the growing of alfalfa; that the land in said 15,000 acre tract and in said parcel thereof in Paragraph VII hereof described, was then of the reasonable and market value of not less than $30.00 per acre, and the capital stock of said Irrigation Company was then of the reasonable and market value of $70.00 per share; that the cost to clear, plow, level and make ready for seeding any and all of the land referred to and described in Paragraph VII hereof, was then, and would be, not to exceed $6.00 per acre.

VII.

That on July 10, 1914, said plaintiffs and each of them, believed the statements and representations, and each of them, made by said defendant as aforesaid, and above set forth in Paragraph VI, to be true, and relied upon them, and each of them, and so believing and relying upon said statements and representations and each of them, and pursuaded and induced by said statements and representations, plaintiffs on July 10, 1914, made and entered into an agreement to purchase from the said defendant a parcel of the above describd 15,000 acre tract, which parcel is particularly described as follows: Lots One (1) and Two (2), and the Northwest Quarter (NW¼) of the Southwest Quarter (SW¼) of Section Fifteen (15) and the East Half (E½) of Section Sixteen (16), all in Township 29 South, Range 10 West, of the Salt Lake Basin and Meridian, Beaver County, Utah, and at the same time and place they agreed to purchase from said defendants 445 shares of the capital stock of said Irrigation Company, for which they gave to said Delta Company one note for $13,197.00 payable on or before two years after date, with interest at the rate of 7 per cent per annum, said note being secured by a mortgage on the Southeast quarter of Section Twenty (20) township 12 South Range 14 East, S. B. M., Imperial County, California, and being further secured by an assignment to said defendant of a certain promissory note for $10,000.00 made by Annie Belford, together with a mortgage securing the same on 144 acres of land, situate near Brawley in Imperial County, California, also

134 shares of stock in Imperial Water Company No. 5, a corporation, of Imperial County, California, nine notes of twenty-eight hundred ($2800.00) Dollars each, with interest at 6 per cent per annum from January 1, 1915, one note for $2730.00, with interest at 6 per cent per annum from January 1, 1915, and one note for $3220.00 with interest at 6 per cent per annum from January 1, 1915; that all of said eleven notes last mentioned were secured by mortgage executed by plaintiffs upon the above described Beaver County, Utah, property; that plaintiffs did each and every thing on their part to be done or performed under and by virtue of the terms of said agreement; that plaintiffs would not, nor would either of them, have purchased said land, or signed, or made or executed, or delivered, said promissory notes, or any or either of them, or said mortgages above set forth, or have done any of the things on their part to be done or performed under and by virtue of the terms and conditions of said agreement, or any of the things done by them, or either of them, as in this complaint set forth, if said representations in Paragraph VI hereof set forth had not been made to them by the said defendant, or if plaintiffs had not believed and relied upon said representations and statements as true. That after the execution of said notes and of said mortgages as aforesaid, plaintiffs entered into possession of said first above described lands in Beaver County, Utah, and farmed the same and attempted to raise crops thereon during the season of 1915; that during the spring of 1915, to wit, on or about April 14, 1915, and before the failure of plaintiff's crops as hereinafter mentioned, said de-

fendant wrote a letter to plaintiffs wherein said defendant falsely and fraudulently represented to plaintiffs that said defendant would give plaintiffs certain discounts, as a bonus, if plaintiffs would be assigning to said defendant certain other securities owned by plaintiffs, make payment in advance of part of the interest and principal of the aforesaid securities given to said defendant by plaintiffs in payment for said land and water stock; that believing the statements and representations of said defendant, as set forth in aforesaid letters and relying upon them, plaintiffs assigned and delivered to said defendant a certain promissory note and mortgage made and executed by one William G. Richter and wife to plaintiffs, in which said note and mortgage plaintiffs were the owners and holders of an equity in the sum of $4000.00, and plaintiffs are informed and believe, and on information and belief allege, that said defendants collected said $4000.00 and received the benefits thereof; that plaintiffs crops attempted to be raised on said land in 1915 were a failure by reason of the failure of said defendant Delta Company to furnish water for the irrigation thereof; that in consequence of the failure of the crops of the plaintiffs as aforesaid, plaintiffs were unable to meet the payments of interest or principal of aforesaid notes given by plaintiffs to said defendant, as aforesaid; that upon the failure of plaintiffs to meet said payments of interest and principal said defendant demanded that plaintiffs give further security for the payment of aforesaid notes and demanded especially that plaintiffs make and execute to said defendant a

trust deed of all of the East Half (E½) of Section Twenty (20), Township 12 South, Range 14 East, San Bernardino Base and Meridian, California, and demanded further that plaintiffs assign to said defendant a certain note and mortgage for $12,000.00, made and executed by Joseph Carrick to plaintiffs; that plaintiffs protested the proposed arrangement, and that the said defendant then and there stated to plaintiffs that inasmuch as plaintiff's note for $13,197.00 secured by mortgage on aforesaid Southeast Quarter of said Section Twenty (20), Township 12 South, Range Fourteen (14) East, San Bernardino Meridian, was then or would shortly be due, and subject to foreclosure, and that inasmuch as there was at that time no considerable demand for land in Imperial County, California, that unless plaintiffs agreed to enter into said proposed arrangement with the defendant, said defendant would by the foreclosure of aforesaid mortgage, get all of the land and securities owned by the plaintiffs; that said defendant further represented to plaintiffs, falsely and fraudulently, that its failure to deliver the necessary water to irrigate the aforesaid Beaver County, Utah, lands was due to the incompetence of said defendant's superintendent, and that there was, and had been, during the season of 1915, a sufficient supply of water for the irrigation of said land, but that the water had been wasted and lost by reason of the incompetence of said superintendent; that defendant further and falsely and fraudulently represented to plaintiffs that there would be a bountiful supply of water thereafter, and said defendant reiterated and

stated as true all of the false and fraudulent statements hereinabove set out in order to induce the plaintiffs to enter into the proposed new agreement with said defendant; that plaintiffs believing said false and fraudulent statements to be true, and believing that said defendant would carry out its threat to foreclose the aforesaid mortgage, and take all of the property of plaintiffs, on or about the 1st day of January, 1916, entered into the following agreement with the said defendant, to wit, the said defendant agreed to cancel all notes and mortgages theretofore executed by plaintiffs to said defendant and to accept as full payment for aforesaid lands in Beaver County, Utah, and for aforesaid water stock, a trust deed of the East Half of aforesaid Section Twenty (20), Township 12 South, Range 14 East, San Bernardino Base and Meridian, in Imperial County, California, securing a note for $55,000.00, the above mentioned $10,000.00 note executed by Annie Belford to plaintiffs, together with a note for $12,000.00 made and executed by Joseph Carrick to plaintiffs, and secured by mortgage on Imperial County land, together with a mortgage upon all of the aforesaid land in Beaver County, Utah, sold by said defendant to plaintiffs; that plaintiffs entered into said arrangement as aforesaid, on or about January 1, 1916, and made and executed to said defendant their promissory note for $55,000.00, said note being secured by a trust deed to Peoples Abstract & Title Company of El Centro, Imperial County, California, for the use and benefit of said defendant, of the East half of said Section 20; that said $55,000.00 note was further secured by the assignment by plaintiffs to said

defendant of the aforesaid Annie Belford note and mortgage for $10,000.00 and by the assignment by plaintiffs to said defendant of the aforesaid Joseph Carrick note and mortgage for $12,000.00; that said $55,000.00 note was secured by trust deed of all of the aforesaid Utah lands; that under the terms of the aforesaid agreement, hereinbefore mentioned as having been made and entered into on or about January 1, 1916, the said defendant agreed to advance to plaintiffs certain sums of money for the purpose of financing the farming of said Beaver County lands; that said defendant did, from time to time, advance to plaintiffs sums of money for said purpose, the exact amount of said sums so advanced being to plaintiffs unknown; that plaintiffs would not, nor would either of them, have made or signed or executed or delivered said promissory note for $55,000.00, or said trust deeds hereinabove set forth, or have assigned said securities hereinabove mentioned as having been assigned by plaintiffs to said defendant, or either of them, or have done any of the things on their part to be done or performed under and by virtue of the terms and conditions of said agreement, if said defendant had not made the false and fraudulent statements and representations in Paragraph VI hereof set forth, and repeated and reiterated said statements and representations as he hereinabove in this Paragraph set forth or if said defendant had not coerced and threatened plaintiffs as aforesaid, or if plaintiffs had not believed and relied upon said representations and statements as true. That after making and entering into aforesaid agreement on

or about January 1, 1916, as aforesaid, and believing and relying upon the aforesaid false and fraudulent statements of said defendant, the plaintiffs did, again attempt to farm, said land and to raise crops thereon in the summer of 1916, but despite the utmost efforts of the plaintiffs said crops were a total failure, due to the failure of said defendant to furnish water for the irrigation thereof; that upon the failure of the crops in 1916, as aforesaid, the said defendant false and fraudulently represented to plaintiffs that the failure to supply water in 1916, was due to defects in the canals and ditches provided for conducting the water to said lands, and that said defects would be immediately corrected by said defendant, and that thereafter there would be no shortage of water and that if plaintiffs would retain possession of said lands and farm the same another year the said defendants would rebate to the plaintiff certain sums of money as compensation to the plaintiffs for the loss of their crops in 1916, by reason of the failure of said defendant to furnish water for the irrigation thereof, as aforesaid and that said defendant reiterated and stated as true all of the false and fraudulent representations hereinabove stated; that plaintiffs believed the statements and representations of said defendant and retained possession of said lands and attempted to farm the same and raise crops thereon during the season of 1917, and that said defendant did rebate to plaintiffs as compensation for the loss of their crops by reason of water shortage in 1916, the sum of about $1869.00; that the crops attempted to be raised on said land by plain-

tiffs during the season of 1917, were a failure, by reason of the fact that said defendant again failed to provide water for the irrigation thereof, and that on or about August 1, 1917, plaintiffs discovered that all of the statements and representations respecting the water supply and the failure thereof, hereinabove set out as having been made by said defendant to plaintiffs, were false and untrue, and that said defendant had never had, and would never have, a sufficient supply of water for the irrigation of aforesaid lands, and that there had never been and would never be, a sufficient supply of water in said Beaver river for the irrigation thereof.

VIII.

That at all times herein mentioned, and before the execution of the agreement herein before mentioned as having been executed July 10, 1914, said defendant made the statements and representations hereinbefore mentioned as having been made by said defendant to the plaintiffs for the purpose of deceiving, misleading and defrauding the plaintiffs, and of persuading and inducing them to make and enter into contracts hereinbefore mentioned and to make, execute and deliver to said defendant the notes, mortgages, and trust deeds hereinbefore alleged and described, and to assign to said defendant the securities hereinbefore mentioned and described, and particularly for the purpose of inducing plaintiffs to enter into the substitute agreement hereinbefore set forth as having been made and entered into on or about January 1, 1916, and that said defendant, then and

there knew that said representations and statements, and each, and all of them to be, and they then and there were false, fraudulent and misleading; that in truth and in fact, the said defendant then and there well knew said 15,000 acres of land was not then, and never had been, fertile, or the richest type of soil found in the western part of the United States, or rich, or responsi*b*e, or loamy soil, or of the best quality, or fertile in every respect, or free from alkali, or free from noxious weeds; but that the same was poor, barren, desert land, of the poorest type and quality found in the western part of the United States, and not fertile in any respect, and was heavily impregnated with black alkali, and heavily seeded to Russian thistle; that said soil was not, nor was any of it, suitable for, or adapted to, growing, and there could not be grown thereon large crops of alfalfa, or wheat, or oats, or barley, or potatoes or sugar beets, or asparagus, or celery, or onions, or apples, or pears, or plums, or cherries, or any other small or large fruits, or all, or any kind, or kinds, of garden truck; that none or any of said products could be raised profitably on said 15,000 acres, or on said parcel in Paragraph VII hereof described, but only poor crops of any of said products could be raised thereon, and then at an expense of money and labor greatly in excess of the market value of the crops; that the quantity of black alkali in said land is detrimental to the growing of any of the crops and requires quantities of water greatly in excess of one fifteen thousandth of each acre thereof; that said valley did not, and does not, pos-

sess, and in the memory of man has never possessed, a long or even growing season, or warm open winters, or a climate that produces or that had produced, bumper crops, but that said valley has, and for many years has had, a growing season of a yearly average of less than three months, with heavy frosts which destroy crops as late as the 22nd of June, and early frosts which terminate the growing season as early as the 9th of September, and frosts which prevent the planting of crops and which destroy the same when planted, as a usual, regular and yearly phenomenon of climate in said valley; in the months of June and September; that crops of any of the aforesaid products that pay or have paid, more than the cost, or as much as the cost of planting and harvesting them, are not, and have not been, obtained in said valley more than once in every seven years; that said defendant had not sold, and did not intend, and never intended, to sell the stock of said Irrigation Company only with, and in conjunction with, an acre of said land, but that they had intended to sell, and had sold, and did sell more than two hundred shares of said stock separate and apart from any sale of said land, to be used with, and appurtenant to, land outside of said 15,000 acre tract that the dam and reservoir and distributing system in Paragraph V above described, was not, and was not intended to be, a million dollar system, and the construction thereof had not, and did not cost one million dollars, but on the contrary the value and cost of construction of said system was not more than $325,000; that the said dam did not have, and was not intended

to have, a cement core running across and through it to bed rock, nor does said dam possess any cement core which extends through more than one-third of said dam or which runs to, or touches, bed rock at all; that said Irrigation Company did not then own, or was it entitled to, the use of all of the flow of water in said Beaver River, except the quantities to which the town of Minersville was represented by said defendant to be entitled, as in Paragraph VI hereof set forth; but the rights of said Irrigation Company in and to the flow of water in said Beaver River, were also subject to the rights of a certain district known as the Beaver Bottoms, lying below said town of Milford, and adjacent to said Beaver River to more than 600 acre feet of water annually from said Beaver River; and that said district known as the Beaver Bottoms at all times herein mentioned, had, and now has, a perpetual right to at least 600 acre feet of water annually from said Beaver River at a point below said town of Milford in said Milford Valley; and that the flow of water in said Beaver River had not been, and would not be, inexhaustible, but that the same had been, and was variable, and not sufficient in quantity each and every year to irrigate 300 acres of land of the kind and quality available in said Milford Valley or of the kind and quality of aforesaid 15,000 acre tract for the purpose of raising crops thereon; and that the flow of water in said river, exclusive of the quantities owned and controlled by said town of Minersville, as aforesaid, has not for the past eight years exceeded 40,000 acre feet, and that it has during said

period varied from 16,400 acre feet per annum to not exceed 40,000 acre feet per annum; and that the amount of said water owned and controlled by said Irrigation Company would not be, and was not, sufficient to furnish all necessary water for irrigating said 15,000 acres for the growing of the aforesaid crops thereon, and that it had not furnished, and it would not furnish, an average each and every year, or a supply in any year of 3 acre feet per acre for each and every acre of said 15,000 acre tract, but that the said supply of water would not be, and had not in any year been, sufficient to supply two acre feet of water on said land; that the average yearly supply of said water owned and controlled by said Irrigation Company had been, and was, on and before said July 10, 1914, less than two acre feet per acre for said 15,000 acre tract; and that a record and survey of the flow of water in said Beaver River at said town of Minersville Beaver County, Utah, had not been made or kept by the United States Government, or by any one, for each year during the fourteen years preceding July 10, 1914, and that no record, or survey, or measurement had been made by the United States Government except for the years 1909, 1910, 1911, 1912, 1913 and 1914, and said record did not show, nor had there ever been, an average flow of water in said river sufficient to fully or at all irrigate 45,000 acres of such land as that in the above described 15,000 acre tract for the raising thereon of any crops whatsoever each and every year, or any year; but the fact is that there was, and that a record kept by the United States Government showed,

that at a point north of, and below the point of diversion of water at Minersville, as aforesaid during the year ending December 31, 1909, a total of 39,200 acre feet, and no more, and during the year ending December 31, 1910, a total of 19,700 acre feet, and no more, and during the year ending December 31, 1911, a total of 19,000 acre feet, and no more, and during the year ending December 31, 1912, a total of 29,200 acre feet, and no more, and during the year ending December 31, 1913, a total of 14,400 acre feet and no more, and during the year ending December 31, 1914, a total of 38,200 acre feet, and no more; and that the cost of maintaining such water system was, and is, in excess of thirty cents per acre per year to the purchasers of parcels in said 15,000 acre tract, and that the said defendant did not intend to sell, and they had not, and have not sold, or kept for sale, the whole of said 15,000 acre tract of land, together with one share of stock in said Irrigation Company for each acre of said land, nor have they devoted said irrigation system to the development of said tract; but that said defendant has sold portions of said water rights in excess of 200 acre feet per year for use on other lands than said 15,000 acre tract; and that neither the soil in said 15,000 acre tract, nor the soil in the parcel thereof described in paragraph VII hereof, was then or ever had been, especially, or at all, adapted to the growing of alfalfa, but that the same could not be planted to alfalfa and made to produce paying quantities of the same in less than five years, or without intensive cultivation by plowing and planting said alfalfa, and plowing the

growth of same under the soil and reseeding the ground and thus replowing and reseeding the ground for at least five years; and that there was not a ready market, or any market, for alfalfa, close to said land, or in said Milford Valley; and that the land in said 15,000 acre tract, and in the parcel thereof in paragraph VII hereof described, was not, on the said July 10, 1914, and never had been, and is not now of the reasonable value, or market value of $30.00 per acre, or any sum more than fifty cents per acre; and that said stock of said Irrigation Company was not on said July 10, 1914, and never had been, and is not now, of the reasonable or market value of $70.00 per share, or any other sum more than $1.00 per share and that the cost to clear, plow, level and make ready for seeding all, or any part, of the land above referred to, and described in Paragraph VII hereof, was not then, and would not be, not to exceed $6.00 per acre, but that said cost was then, and would continue to be, at least $20.00 per acre.

IX.

That the plaintiffs did not know the true facts as herein set forth, or discover the fraud and misrepresentations of the said defendant herein set out, and that they could not, and were not with due diligence able to discover the same until on or about the 10th day of August, 1917, and that on or about the 2nd day of October, 1917, plaintiffs rescinded all purchasers and contracts with said defendant hereinbefore set out and served said defendant with notice of said rescission and tendered to said defendant a quitclaim deed duly executed and acknowledged by plaintiffs reconveying

to said Delta Company all the right, title and interest of said plaintiffs in and to the land on Milford Valley, Beaver County, Utah, which was purchased by plaintiffs from said defendant as set forth and described herein, and tendered and offered to return to said defendant everything of value received from said defendant and that plaintiffs are ready, and do now offer to restore to said defendant everything of value received from said defendant in said purchase, or for or on account of said contracts, and otherwise to do any and all things this Court shall direct in the premises.

X.

That applicants WILLIAM MARTIN BELFORD and ANNIE MARIE BELFORD are husband and wife; that their occupations are farmer and housewife, respectively; that their ages are fifty-one years and forty years, respectively; that their post office address is Highline, California; that their residence is on the following described land for which registration of title is prayed:

Lots Eight (8) and Ten (10), the Southwest Quarter (SW¼) of the Northeast Quarter (NE¼) and the Southeast Quarter (S.E.¼) of the Northwest quarter (NW¼) of Section Three (3) in Township Fourteen (14) South, Range Sixteen (16) East, San Bernardino Meridian, California, according to plat of United States survey approved November 4, 1908, map on file in the office of the County Recorder; assessed valuation $4910.00.

That applicants claim an estate in fee simple in said land, as their community property; that as re-

gards improvements and occupancy by applicants and their predecessors in interest during the five years last past, said land has been improved by levelling, irrigating, cultivation, and by the erection of building and is now occupied by applicants.

That the names and post office addresses of the owners of adjoining lands are:

Ray E. Priest, Highline, California, Thomas A. Robins, Brawley, California; Lewis E. Jordan, Lamanda Park, California, Olive V. Mills, Goldroad, Arizona; Albert Crawford, Claremont, California; Peter Molloy, Virginia City, Nevada.

That said land is subject to:

Right of way for mains, laterals, waste canals, telephone lines and other structures, in favor of Imperial Water Company No. 5, a corporation, of Holtville, California, unrecorded.

That the Delta Land and Water Company, a corporation of Milford, Utah, claims some right, title or interest in and to said land by virtue of the assignments to them of a certain mortgage said assignments being recorded in Book 3 of Assignments of Mortgages at page 180; in book 4; of Assignments of Mortgages at page 128; that all of the claims of said Delta Land and Water Company are without right, and void, and that said mortgage, together with the debt thereby secured, has been fully paid, satisfied and discharged.

Applicants William Martin Belford and Annie Marie Belford allege that the claims of aforesaid Delta Land & Water Company are without right, and void,

by reason of the facts heretofore alleged in Paragraphs V, VI, VII, VIII, IX, of this petition, all of which allegations, said applicants are informed and believe and, on such information and belief allege are true.

WHEREFORE applicants pray the Court to find and declare the title and interest of them in and to said lands, and decree the same and enter an order to the Register of Titles to register said land pursuant to the act above mentioned, and for such other and further relief as to the Court shall seem meet and proper.

H. F. DAVIS,
Attorney for Applicants.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF IMPERIAL,)

FRIEND JAMES AUSTIN, being first duly sworn, deposes and says: That he is one of the petitioners in the foregoing petition for land registration; that he has read the within petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief and that as to those matters he believes it to be true.

FRIEND JAMES AUSTIN

Subscribed and sworn to before me this 2nd day of October, 1917.

Davis E. Doke.

Notary Public in and for the county of Imperial, state of California.

(Notarial seal)

My commission expires Feb. 20, 1931.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF IMPERIAL.)

Lettie Mary Austin, being first duly sworn, deposes and says, that she is one of the petitioners in the foregoing petition for land registration; that she has read the within petition, and knows the contents thereof; that the same is true of her own knowledge except as to the matters therein stated on information and belief and that as to those matters she believes it to be true.

Lettie Mary Austin

Subscribed and sworn to before me this 2nd day of October, 1917.

David E. Doke.

Notary Public in and for the county of Imperial, state of California.

My commission expires Feb. 20, 1921.

(Notarial Seal)

STATE OF CALIFORNIA,)
) ss.
COUNTY OF IMPERIAL.)

WILLIAM MARTIN BELFORD and ANNIE MARIE BELFORD, being first duly sworn, depose and say: That they are two of the petitioners in the foregoing petition for land registration; that they have read the within petition in so far as it relates to affiants' own petition and know the contents thereof; that the same is true of their own knowledge except as to the matters therein stated on information and belief and that as to those matters they believe it to be true.

Annie Marie Belford

William Martin Belford.

Subscribed and sworn to before me this 28th day of September, 1917.

T. F. Parmalee.

Notary Public in and for the county of Imperial, state of California.

(Notarial Seal)

That the aforesaid petition is hereinafter referred to in this Bill in Equity as the Proceeding to Register Title.

12. That thereafter and on the second day of October, 1917, a notice of application for registration of title to the land described in the above entitled petition was issued by the superior court of the state of California, in and for said county of Imperial, which said notice was in words and figures as follows, to wit:

NOTICE OF APPLICATION FOR REGISTRATION OF TITLE TO LAND IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF IMPERIAL.

In the matter of the application of Friend James Austin, Lettie Mary Austin, William Martin Belford and Annie Marie Belford, petitioners, vs. County of Imperial, a body politic, Inter-California Railway Company, a corporation, Ira Aten, Title Insurance and Trust Company, a corporation, C. I. Whitesell, Imperial Water Company No. 3, a corporation, Peoples Abstract and Title Company, a corporation, The Pacific Mutual Life Insurance Company of California, a corporation, Stephen A. Shepp, Victor W. Bailey,

Delta Land and Water Company, a corporation, Lily G. Uzell, Ray E. Priest, Thomas A. Robins, Lewis E. Jordan, Olive V. Mills, Albert Crawford, Peter Molley, Imperial Water Company No. 5, a corporation, Imperial Irrigation District, a corporation, and all other persons, known and unknown, whom it may concern or who claim any right, title, interest, estate, or lien in the real property described in the petition in this action, adverse to the plaintiffs' ownership, defendants.

The People of the State of California, to the above named defendants, and to all persons who have or claim to have any interest in or lien upon the land described herein, and to all whom it may concern, Greeting:

Take notice that on the 2nd day of October, 1917, the verified petition of the above named petitioners was filed in the office of the Clerk of the Superior Court of the County of Imperial, praying for a decree directing the registration of title to the following described real property located and situated in the County of Imperial, State of California, as described in said petition, to wit:

Application No. 1:—Owned by Friend James Austin and Lettie Mary Austin. All of the East Half (E½) of Section 20, T. 12 S. R. 14 E., S. B. M., except a strip 100 feet wide therethrough owned by the Inter-California Railway Company and more particularly described in deed recorded in Book 117 of Deeds, at Page 86, Imperial County Records; and the SW¼ of Section 4, T. 12 S. R., 15 E., S. B. M.

Application No. 2:—Owned by William Martin Belford and Annie Marie Belford. Lots 8 and 10, the SW¼ of the NE¼ and the SE¼ of the NW¼ of Section 3, T. 14 S. R. 16 E., S. B. M.

Said petition prays for a decree declaring the petitioners herein to be the owners in fee of said real property as described in said petition, and that certificates of title to said real property be issued to petitioners in accordance with the provisions of the Act adopted by the People of the State of California, on November 3, 1914, entitled "An Act to Amend an Act Entitled 'An Act for the Certification of Land Titles and the Simplification of the Transfer of Real Estate', Approved March 17, 1897."

You are, therefore, hereby notified to appear and answer said petition within ten days after personal service of this notice upon you, if served within the County of Imperial, or within thirty days after personal service of this notice upon you, if served elsewhere in the State of California, or within sixty days after the first publication of this notice, if it has not been personally served upon you in said State, and to show cause by your answer why said petition should not be granted, and if you fail to so appear and answer as aforesaid, and to show cause, if any you have, why said petition should not be granted, the Court will grant said petition, and will order the registration of title to said lands, in accordance with the provisions of said law, and you will be forever barred from disputing the same.

WITNESS, the Honorable Franklin J. Cole, Judge of the Superior Court of the State of California, in and for the County of Imperial, this 2nd day of October, 1917.

Given under my hand and seal of the said Superior Court of the County of Imperial, State of California, this 2nd day of October, 1917.

M. S. Cook, Clerk

By F. E. Cooper, Deputy Clerk.

(Superior Court Seal)

Good cause appearing therefor, it is hereby ordered that the above entitled notice be published in the "Imperial Valley Press" a daily newspaper of general circulation, published and circulated in the County of Imperial, State of California, once a week for four successive weeks; that the form and substance of said Notice is hereby approved.

Dated this 2nd day of October, 1917.

FRANKLIN J. COLE

Judge of the Superior Court.

Endorsed:

"Filed OCT 3 1917

M. S. COOK, County Clerk

By C. E. Williford, Deputy".

13. That the defendants Friend J. Austin and Lettie M. Austin did on the second day of October, 1917, with intent and design to cheat and defraud the plaintiff, as aforesaid, and as a part of their fraudulent scheme to mislead the plaintiff and to prevent it from obtaining any knowledge or information as to the

institution or pendency of the aforesaid action to register title, did file in the superior court of the county of Imperial, state of California, an action entitled, "Friend J. Austin and Lettie M. Austin, plaintiffs, v. Delta Land & Water Company, a corporation, Western Securities Company, a corporation, Frances Investment Company, a corporation, W. I. Moody, Lloyd Sigler, George A. Snow, John Doe and Richard Roe, defendants", being action No. 4007, records of said court, wherein the plaintiffs prayed that the contract entered into between them and the Delta Land & Water Company for the purchase of certain lands in Utah be rescinded and held for naught, and that the aforesaid promissory note and deed of trust given by the defendants Friend J, Austin and Lettie M. Austin of date January 1, 1916, be cancelled and held for naught; that the aforesaid note and mortgage of the defendant Annie Marie Belford be returned to the said Friend J. Austin and Lettie M. Austin, or be cancelled and held for naught, and that the said note and mortgage of the said Joseph Carrick of date March 3, 1915, be returned to the said Friend J. Austin and Lettie M. Austin or be cancelled and held for naught; and as further relief prayed that the title to the land described in the aforesaid trust deed and mortgage of Friend J. Austin and Lettie M. Austin of date January 1, 1916, be registered in the name of the said Friend J. Austin and Lettie M. Austin under the provisions of that certain law enacted by the people of the state of California, adopted and passed at the general election held on November 3, 1914, entitled, "An Act to Amend an Act entitled 'An Act for the Certification of Land

Titles and the Simplification of the Transfer of Real Estate,' Approved March 1897".

That no personal service of summons in said action was ever made within the state of California upon either this plaintiff or said Delta Land & Water Company, but that the said Friend J. Austin and Lettie M. Austin well knowing or believing that the Delta Land & Water Company and the plaintiff herein, being non-resident corporations, would not appear in said action unless due and proper substituted service were made upon them in the manner provided by the Code of Civil Procedure of the state of California, also as a part of their plan to deceive and mislead the said Delta Land & Water Company and the plaintiff, failed and refrained from filing any affidavits in said action requesting that service by publication upon said defendants be authorized, and procured no order of the said superior court of the county of Imperial in said cause, ordering or directing service by publication of summons upon any of the defendants named in said action, and thereafter and on or about the first day of November, 1917, in furtherance of their scheme and plan to deceive and mislead the plaintiff, caused to be deposited in the postoffice at El Centro, county of Imperial, California, a copy of said complaint and summons last referred to, addressed to the Delta Land & Water Company at Milford, Utah, which said copies were received by the said Delta Land & Water Company in due course of the United States mail, on or about the 3rd day of November, 1917, and also on or about the first day of November, 1917, in furtherance of their plan and scheme to deceive and mislead the plaintiff, caused to

be served upon one Mima Stringer, a clerk in the office of the Delta Land & Water Company, at the town of Milford, state of Utah, by one H. Fred Scott, a copy of the aforesaid complaint and summons in the action last referred to.

That at or about the time the summons and complaint were delivered to said Mima Stringer at Milford, Utah, by H. Fred Scott, as aforesaid, the Delta Land & Water Company and the plaintiff, through their attorney, made due inquiry to ascertain if service by publication had been ordered by the court in said action, and upon learning that no affidavit or order therefor had been made, did not appear in said action.

14. That thereafter, on the 26th day of November, 1917, The Peoples Abstract & Title Company, defendant herein, was duly served with a copy of the aforesaid petition and notice in the Action to Register Title hereinbefore set forth in paragraph 11, as trustee under the aforesaid trust deed of date January 1, 1916. Plaintiff is informed and believes, and upon such information and belief alleges, that the defendant The Peoples Abstract & Title Company, fraudulently colluded with the defendants Friend J. Austin and Lettie M. Austin, and with secret intent and design not to appear in the said action to protect the interests of its beneficiary under said trust deed of January 1, 1916, or to make any defense to the aforesaid action, failed and neglected to notify or inform the plaintiff or the Delta Land & Water Company at any time or at all of the institution or pendency of the aforesaid action to register title, or of the service

upon it, The Peoples Abstract & Title Company, of the aforesaid petition and notice, or of its intention and design not to appear in said action or to make any defense thereto, or to protect the rights of the beneficiary under said trust deed of January 1, 1916, although the said defendant had theretofore and on the 4th day of April, 1917, informed the plaintiff and the Delta Land & Water Company that it was its custom and practice in all cases to take whatever steps were necessary to protect the interests of the beneficiary under any trust deed in which it, the said defendant, was trustee, and at said time represented to and assured the plaintiff and the Delta Land & Water Company that it would at all times protect the interests of the beneficiary under the said trust deed of date January 1, 1916, hereinbefore set forth. Plaintiff alleges that the plaintiff and the Delta Land & Water Company did at all times thereafter rely upon the said representations and assurances of the said defendant, The Peoples Abstract & Title Company, that it would at all times protect the beneficiary under said trust deed of January 1, 1916, and that it would take whatever steps were necessary in any case to protect the interests of said beneficiary and advise them of the pendency of any proceedings affecting their interests under said trust deed. Plaintiff is informed and believes and upon such information and belief alleges that the defendant The Peoples Abstract & Title Company did, through fraudulent collusion with the defendants Friend J. Austin and Lettie M. Austin, and in disregard of the promises and as-

surances made by it to the plaintiff, as hereinbefore set forth, and in disregard of its duties and obligations towards its beneficiary as trustee under said trust deed of January 1, 1916, deliberately and intentionally fail and neglect to appear in the said action to register title or to notify plaintiff of the pendency thereof, or to make any defense thereto, or to take any steps to protect the interests of the beneficiary under said trust deed, and permitted a default to be entered against it in said action on the 10th day of December, 1917.

15. That on or about the 3rd day of November, 1917, the defendants Friend J. Austin, Lettie M. Austin, Annie Marie Belford and William Martin Belford, with intent and design to injure and defraud the Delta Land & Water Company, and the plaintiff, and to deceive and mislead said superior court of Imperial County, California, did procure and file with the clerk of said court in the above entitled proceeding to register title, an affidavit of one M. J. Davis in words and figures as follows, to wit:

STATE OF CALIFORNIA,)
) ss.
COUNTY OF IMPERIAL.)

M. J. Davis, being first duly sworn, deposes and says: That she is a citizen of the United States, over the age of eighteen years, and not a party to the proceeding known as numbered in the records and files of the Clerk of the County of Imperial, State of California, as L. R. No. 7, a copy of the petition and notice in which matter are hereto attached; that affiant did on No-

vember 1st, 1917, deposit in the post office at El Centro, California, postage prepaid, in a sealed envelope addressed to the Delta Land and Water Company, Milford, Utah, a copy of the attached petition and notice; that affiant did on October 3rd, 1917, deposit in the post office at El Centro, California, postage prepaid, in sealed envelopes, copies of the attached notices addressed to the following persons, at the addresses following: Olive V. Mills, at Goldroad, Arizona; Peter Molloy, at Virginia City, Nevada.

M. J. Davis

SUBSCRIBED AND SWORN TO BEFORE ME this 1st day of November, 1917.

L. P. Sargent.

Notary Public in and for the County of Imperial, State of California.
(Notarial seal)

That the statement contained in said affidavit that "affiant did on November 1, 1917, deposit in the post-office at El Centro, California, postage prepaid, in a sealed envelope, addressed to the Delta Land & Water Company, Milford, Utah, a copy of the within petition and notice" was, and is, untrue, false and fraudulent, in that neither a copy of the said petition or of the said notice referred to in said affidavit was, on the date set forth in said affidavit, or at any other time or at all, deposited in the postoffice at El Centro, California, or at any other place or at all, addressed to the Delta Land & Water Company, or to the plaintiff herein, the sole and only notice or instrument which was mailed

to said Delta Land and Water Company by said affiant on the first day of November, 1917, or at any other time, being the summons and complaint in said Civil Action wherein the said Friend J. Austin and Lettie M. Austin were plaintiffs and Delta Land and Water Company et al. were defendants, as aforesaid; that the Delta Land & Water Company did not, nor did the plaintiff, at any time, receive through the mail, or otherwise, a copy of said petition and notice, or any notice of the institution and pendency of said action to register title.

16. That on or about the 3rd day of November, 1917, the defendants Friend J. Austin, Lettie M. Austin, Annie Marie Belford and William Martin Belford, also with intent and design to defraud the plaintiff and the Delta Land & Water Company, and to deceive and mislead said Superior Court also, procured and caused to be filed with the clerk of the superior court of the county of Imperial, state of California, in the above entitled proceeding to register title, a purported return of service in words and figures as follows, to wit:

STATE OF UTAH,)
) ss.
COUNTY OF BEAVER.)

H. Fred Scott being duly sworn, deposes and says: That he is, and was at the times of the service of the papers herein referred to, a citizen of the United States, and over the age of eighteen years; that he personally served a copy of the attached Notice and petition on the hereinafter named parties, by delivering to and

leaving same with each of said parties personally, in the County of Beaver, State of Utah, at the times set opposite their respective names.

Names of parties served — Time of service.

Delta Land & Water Company, a corporation by delivering to Mina Stringer as and who at that time was the duly appointed and acting Business Manager thereof.

November 1st 1917.

Subscribed and sworn to before me this 1st day of November, 1917.

C. T. Woodbury — H. Fred Scott

Notary Public in and for the county of Beaver, state of Utah.

(Notarial Seal).

That the foregoing return of service was, and is, untrue, false and fraudulent, in that the said affiant, H. Fred Scott, did not, on the first day of November, 1917, or at any other time, or at all, deliver to said Delta Land & Water Company, or to any person whomsoever for it, at the county of Beaver, state of Utah, or at any other place, or at all, a copy of the said notice or petition in the aforesaid action to register title, the sole and only notice or instrument which was ever delivered by said Scott to any person for said Delta Land & Water Company being the summons and complaint in said civil action delivered by him to Mima Stringer, as aforesaid.

17. That thereafter and on or about the 4th day of December, 1917, the defendants Friend J. Austin, Lettie M. Austin, Annie Marie Belford and William

Martin Belford, pursuant to, and as a part of, their scheme to defraud and injure the plaintiff and the Delta Land & Water Company, and to deceive the court, through their attorney, M. J. Davis, did present to the Hon. Franklin J. Cole, Judge of said superior court, the foregoing false and fraudulent affidavit of M. J. Davis, and the foregoing false and fraudulent return of service of H. Fred Scott, and did by means of said false and fraudulent affidavit and said false and fraudulent return of service, procure from said Judge of said superior court an order to enter the default of the Delta Land & Water Company in the aforesaid action to register title, which said order is in words and figures as follows, to wit:

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF IMPERIAL.

IN THE MATTER OF THE APPLICATION OF FRIEND JAMES AUSTIN ET AL, FOR INITIAL REGISTRATION OF TITLE OF LAND.	ORDER TO ENTER DEFAULT After Publication of Notice.

It appearing to the Court, from the papers, records and files in this action, that the petition herein was duly filed, and that on the 2nd day of October, 1917,

notice was ordered published and it appearing to the Court that said notice was published as ordered or that the same has been duly served upon the defendants Lily G. Uzzell, Delta Land & Water Company, a corporation, Olive V. Mills, Peter Molloy and Albert Crawford, in the manner required by law and that said defendants have not, nor have any of them, within the time allowed by law, or at all, appeared or defended, and do not now appear or defend, the default of said defendants is hereby ordered entered.

The Clerk will make the necessary record of entry of default.

Franklin J. Cole.
Judge.

Endorsed:

Filed Dec 4 1917.
M. S. Cook, County Clerk
By E. B. Wilson, Deputy
at*v* 9:15 A. M.

And did thereafter, on the 7th day of December, 1917, procure from said court a decree, signed by the Judge thereof, in the above entitled application for registration of title, which decree was in words and figures as follows, to wit:

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF IMPERIAL.

IN THE MATTER OF THE APPLICATION OF FRIEND JAMES AUSTIN, LETTIE MARY AUSTIN, WILLIAM MARTIN BELFORD AND ANNIE MARIE BELFORD, FOR INITIAL REGISTRATION OF TITLE TO LAND.	L. R. No. 7 FINDINGS OF FACT AND DECREE.

The petition in the above entitled matter having been filed at 4:47 P. M., October 2, 1917, came on regularly for hearing on the 7th day of December, 1917, and was continued to the 13th day of December, 1917, before this Court, upon the verified petition and application of the above named petitioners, and the answers and stipulations of defendants, H. F. Davis, acting as counsel for the said petitioners and no one appearing for defendants, and after a full consideration thereof, and upon the proofs, exhibits and testimony of the petitioners and witnesses the Court finds and decrees:

That notice of the filing of the petition of above-named applicants was duly published in the "Imperial Valley Press", a daily newspaper of general circulation, published in the City of El Centro, County of Imperial, State of California, as heretofore designated and ordered by this Court, once a week for four successive weeks, beginning October 3, 1917.

That all persons, known and unknown, interested in the land described in the petition herein have either assented in writing to the registration of title to said lands or have been duly and properly served with notice of the filing of the petition, and with a copy of said petition in all cases where required by law, proof of which has been duly filed; that the time of all persons to enter an appearance herein has expired and that all such persons, known and unknown, are properly before the Court,

That no one, other than County of Imperial, a corporation, Imperial Irrigation District, a corporation, Imperial Water Company No. 3, a corporation, and The Pacific Mutual Life Insurance Company of California, a corporation, has appeared, and that the default of all such other persons has heretofore been entered, and as to them the allegations of the petition are taken as confessed and true.

That it appears from the evidence, both oral and written, and from an examination of the papers on file in this matter, that the facts alleged in said petition and application are true, and they are hereby declared to be true; that the Court has in this matter,

jurisdiction over all persons, known and unknown, as well as over the lands described in said petition.

That the petitioners, either by themselves or by themselves and their predecessors in interest, have been in the actual, exclusive and adverse possession of the lands described in said petition as belonging to them, continuously for more than five years next preceding the filing of said petition, claiming as of right against the world, to own the same in fee simple, and that they have paid all taxes and assessments, of every kind, legally levied or assessed against said land during said five year period.

That each of the petitioners herein is over the age of twenty-one years and free from any legal disability.

That petitioners William Belford and Annie Marie Belford have, since the filing of the petition herein, sold and conveyed to petitioners Friend James Austin and Lettie Mary Austin all of their right, title and interest in and to the land in said petition described as belonging to said William Martin Belford and Annie Marie Belford, and that Friend James Austin and Lettie Mary Austin have been, by proper order, substituted herein in the place and stead of said William Martin Belford and Annie Marie Belford.

The Court further specifically finds and decrees:

That Petitioner Friend James Austin, aged sixty-years, and petitioner Lettie Mary Austin, aged fifty-five years, are husband and wife; that they are by occupation farmer and housewife, respectively; that petitioners' residence and post office address is Calipatria, California; that said petitioners are the owners,

in fee simple, of the following described separate parcel of land, to wit:

All of the East Half (E½) of Section Twenty (20), in Township Twelve (12) South, Range Fourteen (14) East, San Bernardino Meridian, California, according to the United States re-survey of said land officially approved by the Surveyor-General February 8th, 1916, except a strip one hundred (100) feet wide therethrough owned by the Inter-California Railway Company, and more particularly described in deed recorded in Book 117, of Deeds, at page 86, Imperial County Records.

That a map of said land, on which the same can be identified by reference, is on file in the office of the County Recorder of Imperial County.

That said land is the community property of said petitioners.

That the value of the said land, together with the permanent improvements thereon, as assessed at the last assessment for County taxation, next preceding the filing of the petition herein, was $10,700.00.

That said land and the owners' estate therein is subject to the following particular estates, mortgages, easements, liens, attachments, charges or encumbrance, in relative priority, and to none other:

1. A right of way for an irrigation system and telephone lines over any part of said land, in favor of Imperial Water Company No. 3, a corporation, of Calipatria, California; recorded in book 91, page 222 of deeds, Imperial County records.

2. A mortgage of the North Half (N½) of said land, being the Northeast Quarter (NE¼) of said

Section Twenty (20), dated February 16, 1915, recorded in Book 35, page 57 of Mortgages, Imperial County Records, given to secure the payment to The Pacific Mutual Life Insurance Company of California, a corporation, of Los Angeles, California, of a promissory note of even date for Six Thousand ($6000.00) Dollars, payable five years after date, with interest at eight per cent per annum, payable semi-annually.

3. A right of way for a road over the Easterly Thirty (30) feet and the Northerly Thirty (30) feet of said land, in favor of Imperial County; unrecorded.

That petitioners Friend James Austin and Lettie Mary Austin are also the owners of the following described separate parcel of land, in the same manner and right:—

The Southwest Quarter (SW¼) of Section Four (4), in Township Twelve (12) South, Range Fifteen (15) East, San Bernardino Meridian, California, according to the United States re-survey of said land officially approved by the Surveyor-General February 8th, 1916.

That a map of said land, on which the same can be identified by reference, is on file in the office of the County Recorder of Imperial County.

That said land is the community property of said petitioners.

That the value of the said land, together with the permanent improvement thereon, as assessed at the last assessment for County taxation, next preceding the filing of the petition herein, was $5000.00.

That said land and the owners' estate therein is subject to the following particular estates, mortgages, assessments, liens, attachments, charges or encumbrances, in relative priority, and to none other:—

1. A right of way for ditches, canals and telephone lines over any part of said land, in favor of Imperial Water Company No. 3, a corporation, of Calipatria, California; recorded in Book 89 of Deeds, at page 11, Imperial County records.

2. An unrecorded lease, in favor of Stephen A. Shepp, of Calipatria, California, which expires January 1, 1919.

That Petitioners Friend James Austin and Lettie Mary Austin are also the owners of the following described separate parcel of land, in the same manner and rights:—

Lots Eight (8) and Ten (10), the Southwest quarter (SW¼)of the Northeast Quarter (NE¼) and the Southeast Quarter (SE¼) of the Northwest Quarter (NW¼), of Section Three (3), in Township Fourteen (14) South, Range Sixteen (16) East, San Bernardino Meridian, California, according to the United States re-survey of said land officially approved by the Surveyor-General November 4, 1908.

That a map of said land, on which the same can be identified by reference, is on file in the office of the County Recorder of Imperial County.

That said land is the community property of said petitioners.

That the value of said land, together with the permanent improvements thereon, as assessed at the last

assessment for County taxation, next preceding the filing of the petition herein, was $4910.00.

That said land the owners' estate therein is subject to the following particular estates, mortgages, easements, liens, attachments, charges and encumbrances, in relative priority, and to none other:—

Right of way for mains, laterals, waste canals, telephone lines and other structures, in favor of Imperial Water Company No. 6, a corporation, of Holtville, California; unrecorded.

IT IS THEREFORE adjudged and decreed that the title of the petitioners to the land be confirmed and registered, and it is ordered that the Registrar, upon a certified copy of this decree being filed with him, issue certificates of title as provided by law, to the petitioners herein mentioned for the land found to belong to them. That all of said lands are hereby brought under the operation of said act and registered according to said Act. And this decree shall, as provided in said Act, forever quiet the title to the land herein ordered registered and be final and conclusive as against the rights of all persons, known and unknown, to assert any estate, interest, claim, lien or demand, of any kind or nature whatsoever, against said land or any part thereof, except only as herein found and as in the Act provided.

DONE IN OPEN COURT, this 7th day of December, 1917.

FRANKLIN J. COLE
Judge of the Superior Court.

O. K.
Frank Erzinger, Registrar.

Endorsed:

"FILED DEC 13, 1917
M. S. COOK, County Clerk
By F. E. Cooper, Deputy.'
'Entered Dec. 13, 1917, at 5 P. M.
Book 5, page 83, Judgments."

That thereafter and on the 13th day of December, 1917, the said decree was entered and recorded in book 5, page 83, of Judgments, records of Imperial county, state of California, and on, to wit, the 20th day of December, 1917, the defendants Friend J. Austin and Lettie M. Austin caused a dismissal to be entered of record of the aforesaid civil action No. 4007, mentioned in Paragraph 13 hereof.

That at the time of the entry of said order of default and of the entry of said decree and judgment, neither the Delta Land & Water Company or this plaintiff had been served with a copy of the petition or notice in the aforesaid action to register title, and had not appeared in said proceedings in any manner whatsoever, and that the said court had no jurisdiction of this plaintiff or of the Delta Land & Water Company, and was wholly without jurisdiction to hear or determine any of the rights of this plaintiff, or of its assignor, the Delta Land & Water Company, in the premises described in the said trust deed of date January 1, 1916, and was wholly without jurisdiction to enter its decree as against the said Delta Land & Water Company or this plaintiff, as hereinbefore set forth.

18. That subsequent to the second day of October, 1917, and prior to the 13th day of December, 1917, the

defendants William Martin Belford and Annie Marie Belford sold, transferred and conveyed by instrument of conveyance to the defendants Friend J. Austin and Lettie M. Austin all of their right, title and interest in and to the property described in the aforesaid mortgage of Annie Marie Belford of date June 20, 1914, and that the said defendants Friend J. Austin and Lettie M. Austin are now the owners of the legal fee to said property.

19. That the plaintiff herein and the said Delta Land & Water Company, and each of them, have now, and did have during all of the times herein mentioned, a good, sufficient and meritorious defense to the aforesaid action to register title brought by the defendants Friend J. Austin, Lettie M. Austin, Annie Marie Belford and William Martin Belford, hereinbefore set forth, in so far as the same sought to invalidate or injuriously affect the rights and interests of the beneficiary under said trust deed of January 1, 1916, and the rights and interests of the holder of the aforesaid note and mortgage of Annie Marie Belford of date June 20, 1914. That the plaintiff was a bona fide purchaser for value before maturity of the aforesaid note of the defendants Friend J. Austin and Lettie M. Austin of date January 1, 1916, and of the aforesaid promissory note of Annie Marie Belford and the mortgage securing same of date June 20, 1914. That each and every one of the allegations contained in said application to register title as to false and fraudulent statements and representations alleged to have been made by the Delta Land & Water Company, its agents, serv-

ants or employees, to the defendants Friend J. Austin and Lettie M. Austin, or either of them, is false and untrue.

20. That neither the plaintiff nor the Delta Land & Water Company had any knowledge or information of the institution or pendency of the aforesaid action to register title, or of any of the proceedings had or taken therein as hereinbefore set forth prior to on or about the 28th day of December, 1917.

21. That the defendants Friend J. Austin and Lettie M. Austin are now in possession and control of the premises described in their trust deed and mortgage of date January 1, 1916, and are collecting and converting to their own use and benefit the rents, issues and profits derived therefrom. That unless a receiver is appointed by the court to take charge of the said property described in said trust deed of date January 1, 1916, and to collect and conserve the rents, issues and profits thereof, the same will be wasted and dissipated, to the injury of the plaintiff.

WHEREFORE plaintiff prays:

(a) For judgment against the defendants Friend J. Austin and Lettie M. Austin for the sum of $55,-000.00, United States gold coin, with interest thereon at the rate of six per cent per annum from January 1, 1916, to date.

(b) For judgment against the defendant Annie Marie Belford for the sum of $10,000.00, United States gold coin, with interest thereon at the rate of eight per cent per annum from July 20, 1917, to date.

(c) That the judgment and decree of the superior

court of the county of Imperial, state of California, made in that certain action L. R. No. 7, and entitled, "In the Matter of the Application of Friend James Austin, Lettie Mary Austin, Annie Marie Belford and William Martin Belford, for initial registry of title to land," and entered on December 13, 1917, in book 5, page 83, of Judgments, records of Imperial county, California, be vacated and set aside and declared null and void and of no force and effect, in so far as the same affects the equitable rights and interests of the plaintiff in the property hereinbefore described under that certain trust deed executed by the defendants Friend J. Austin and Lettie M. Austin on January 1, 1916, and under that certain mortgage of the defendant Annie Marie Belford of date June 20, 1914, and that the lien of the plaintiff upon all of the property described in said trust deed and mortgage of date January 1, 1916, and the lien of the plaintiff upon all of the property described in the said mortgage of Annie Marie Belford of date June 20, 1914, be declared a good and valid lien upon all of said property.

(d) That a receiver be appointed to immediately take charge and possession of all of the property described in the aforesaid trust deed and mortgage of January 1, 1916, and receive and collect all the rents, issues and profits thereof and conserve the same under the direction of this court, pending the final determination of this action.

(e) That a decree may be made for the sale of the real estate and water stock described in said trust deed of January 1, 1916, by the United States Marshal,

or such other commissioner as the court may appoint, according to the law and practice of this court; that the proceeds of said sale may be applied in payment of the amount due the plaintiff, and that said defendants Friend J. Austin and Lettie M. Austin, and all persons claiming under them, or either of them, subsequent to the execution of said trust deed upon said land and said water stock, either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all right, claim or equity of redemption in the said property and every part thereof, and that the said plaintiff may have judgment against the defendants Friend J. Austin and Lettie M. Austin for any deficiency which may remain after applying all of the proceeds of the sale of said property properly applicable to the satisfaction of said judgment; that the plaintiff, or any other parties to this suit, may become a purchaser, or purchasers, at said sale; that the United States Marshal, or other commissioner appointed by the court, execute a deed to the purchaser, or purchasers, and that the said purchaser, or purchasers, be let into possession of the premises on production of the Marshal's or Commissier's deed therefor, and that the water stock be transferred by the Imperial Water Company No. 3 upon the books of said company into the name or names of the person or persons producing said deed from the Marshal or Commissioner.

(f) That a decree may be made for the sale of the real estate and water stock described in the said mortgage of Annie Marie Belford of date June 20, 1914, by the United States Marshal, or such other commis-

sioner as the court may appoint, according to the law and the practice of this court. That the proceeds of said sale may be applied in payment of the amount due the plaintiff from the said defendant Annie Marie Belford, and that the said defendants Annie Marie Belford and William Martin Belford, Friend J. Austin and Lettie M. Austin, and all persons claiming under them, or either of them, subsequent to the execution of said mortgage upon said land and said water stock, either as purchasers, encumbrancers, or otherwise may be barred and foreclosed of all right, claim or equity of redemption in the said property and every part thereof, and that the said plaintiff may have judgment against the said defendant Annie Marie Belford for any deficiency that may remain after applying all of the proceeds of the sale of said property properly applicable to the satisfaction of the said judgment herein entered against her and in favor of the plaintiff; that the plaintiff, or any other parties to this suit, may become purchaser or purchasers at said sale; that the Marshal or other commissioner appointed by the court execute a deed to the purchaser or purchasers; that the said purchaser or purchasers be let into possession of the premises on production of the Marshal's or commissioner's deed therefor, and that the water stock be transferred by the Imperial Water Company No. 5 upon the books of said company into the name or names of the person or persons producing the deed from the Marshal or commissioner.

(g) That the amount received by the plaintiff upon the sale of the aforesaid premises described in the mortgage of the defendant Annie Marie Belford shall

be credited as a payment upon the amount of the judgment rendered in favor of the plaintiff and against the defendants Friend J. Austin and Lettie M. Austin.

(h) That a decree may be made for the sale of the promissory note and mortgage of Joseph Carrick of date March 3, 1915, by the United States Marshal, or such other commissioner as the court may appoint, according to the law and the practice of this court. That the proceeds of said sale may be applied in payment of the amount due the plaintiff from the said defendants Friend J. Austin and Lettie M. Austin; or, as alternative relief, in the event that the court shall decree that the aforesaid note and mortgage of Joseph Carrick cannot be sold, as hereinbefore prayed, then and in that event the plaintiff prays that the court retain jurisdiction of the subject matter of this action until such time as the aforesaid note and mortgage of Joseph Carrick become due and payable, and that in the event the aforesaid note and mortgage of Joseph Carrick is not paid in full, according to its terms and conditions when due, then and in that event the plaintiff, or its assignee, may file a supplemental bill in this proceeding praying for a foreclosure of the aforesaid mortgage of the said Joseph Carrick and a sale of the property described therein, according to law and the practice of this court, and for such other relief in the premises as may be just and equitable.

(i) That the plaintiff may have its costs of action and such further relief in the premises as to this court may seem meet and equitable in equity.

W. J. Hunsaker
E. W. Britt
LeRoy M. Edwards
Attorneys for plaintiff.

STATE OF UTAH,)
) ss
County of Salt Lake.)

M. F. RYAN, being first duly sworn, deposes and says:

That he is an officer, to wit, President of the plaintiff corporation above named; that he has read the foregoing bill in equity and knows the contents thereof, and that he has knowledge of the facts therein stated; that the same are true, except as to the matters therein alleged on information and belief, and as to such matters he believes it to be true.

M. F. Ryan

Subscribed and sworn to before me this 7th day of February, 1918.

(Seal) A. E. Burdette

Notary Public in and for the county of Salt Lake, state of Utah.

My commission expires November 2, 1921.

[Endorsed]: ORIGINAL In Equity No. D 61 Eq. In The United States District Court Southern District of California Southern Division FRANCES INVESTMENT COMPANY, a corporation, plaintiff, vs. Friend J. Austin, et al, defendant. BILL IN

EQUITY. FILED FEB 15 1918 CHAS. N. WILLIAMS, Clerk By R. S. ZIMMERMAN, Deputy Clerk STORY & STEIGMEYER HUNSAKER & BRITT AND LE ROY M. EDWARDS 1132-1143 Title Insurance Bldg. Fifth and Spring Streets Los Angeles, Cal. Attorneys for plaintiff

UNITED STATES OF AMERICA

District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

In Equity

The President of the United States of America, Greeting!

To Friend J. Austin, Lettie M. Austin, his wife, William Martin Belford and Annie Marie Belford, his wife, and The Peoples Abstract & Title Company, a corporation.

You Are Hereby Commanded, That you be and appear in said District Court of the United States aforesaid, at the Court Room in Los Angeles, California on or before the twentieth day, excluding the day of service, after service of this subpoena upon you, to answer a Bill of Complaint exhibited against you in said Court by Frances Investment Company, a corporation who is a citizen of the State of Utah and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

Witness, The Honorable Benjamin F. Bledsoe, Judge of the District Court of the United States, this 15th day of February in the year of our Lord one thousand nine hundred and eighteen and of our Independence the one hundred and forty second.

CHAS. N. WILLIAMS

(Seal) Clerk.

By R S Zimerman

Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12 OF RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, PROMULGATED BY THE SUPREME COURT, NOVEMBER 4, 1912.

On or before the twentieth day after service of the subpoena, excluding the day thereof, the defendant is required to file his answer or other defense in the Clerk's Office;

otherwise the Bill may be taken pro confesso.

CHAS. N. WILLIAMS

Clerk.

By R S Zimmerman

Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE }
SOUTHERN DISTRICT OF CALIFORNIA } ss:

I Hereby Certify, That I received the within writ on the 18th day of February, 1918, and personally served the same on the 22nd day of February, 1918, on Friend J. Austin, Lettie M. Austin his wife, Martin

Belford and Annie Marie Belford, his wife, F. B. Fuller, People Abstract & Title Company, a Corp., F. B. Fuller as Director of said Peoples Abstract & Title Co., a Corp., by delivering to and leaving with Them said defendants named therein, personally, at the County of Imperial in said district, a copy thereof

San Diego, Cal.

February 22nd, 1918.

W. T. Walton
U. S. Marshal.
By W. C. Carse
Deputy.

To the Marshal of the United States for the Southern District of California:

Pursuant to Rule 12, the within subpoena is returnable into the Clerk's Office twenty days from the issuing thereof.

Subpoena Issued February 15th, 1918

Chas. N. Williams,
Clerk.
By R S Zimmerman
Deputy Clerk.

[Endorsed]: Marshal's Civil Docket No. 3504 No. D 61 Equity United States District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division IN EQUITY Frances Investment Company, a corporation, vs. Friend J. Austin, et al. SUBPOENA FILED FEB. 27 1918 CHAS. N. WILLIAMS, Clerk. R. S. Zimmerman Deputy Clerk.

In Equity No. D 61

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	:	
Vs.	:	STIPULATION FOR LEAVE TO FILE SUPPLEMENTAL BILL OF COMPLAINT.
FRIEND J. AUSTIN, LETTIE M. AUSTIN, His wife, WILLIAM MARTIN BELFORD, and ANNIE MARIE BELFORD, his wife, and THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, Defendants.	:	

IT IS STIPULATED that the plaintiff may at any time with in thirty (30) days from date hereof file a Supplemental Bill of Complaint herein, bringing in an additional party or parties.

DATED: December 15th, 1919.

Wm Story Jr.
Joseph L. Lewinsohn
Attorneys for Plaintiff.
H. F. Davis
Attorneys for certain Defendants.

So Ordered:

Bledsoe
District Judge.

DATED: December 15, 1919.

[Endorsed]: No. D-61 Equity. United States District Court Southern District of California Southern Division FRANCES INVESTMENT COMPANY a corporation, Plaintiff. vs. FRIEND J. AUSTIN, LETTIE M. AUSTIN, his wife, et al. Defendants. STIPULATION FOR LEAVE TO FILE SUPPLEMENTAL BILL OF COMPLAINT. FILED DEC 15 1919 CHAS. N. WILLIAMS, Clerk By R. S. Zimmerman Deputy Clerk LISSNER & LEWINSOHN Attorneys at Law Lissner Building Los Angeles, Cal.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation,
Plaintiff,
vs.
Friend J. Austin, Lettie M. Austin, his wife, William Martin Belford, Annie Marie Belford, his wife, The Peoples Abstract & Title Company, a corporation, H. F. Davis and Meryl J. Davis, his wife, John W. Austin and Laura A. Austin, his wife, Jasper Thomason, Jesse Boyd Pilcher, Thomas Edwin Gill and Myra Ritzinger Gill, his wife, Harry D. Aron, T. P. Banta, Robert B. Walker, Paul H. Marlay, Richard Doe, John Roe, F. M. Rubblee, Sarah Doe, Jane Doe, Sarah Roe, Jane Roe, A-1 Company, a corporation, B-1 Company, a corporation, C-1 Company, a corporation, Imperial Water Company, No. 1, Imperial Water Company #3, Imperial Water Company #5, Wade M. Boyer and Leah A. Boyer, his wife,
Defendants.

SUPPLEMENTAL BILL IN EQUITY.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

Frances Investment Company, a corporation, organized and existing under and by virtue of the laws of Utah, and a resident of said state, with its principal

place of business in the City of Salt Lake, State of Utah, leave of Court having been first had and obtained, brings this its supplemental bill against Thomas Edwin Gill and Myra Ritzinger Gill, his wife, Harry D. Aron, John W. Austin and Laura A. Austin, his wife, and Jesse Boyd Pilcher, citizens of the State of California and residents of the County of Los Angeles in said st*s*te, H. F. Davis and Merl J. Davis, his wife, and T. P. Banta, Wade N. Boyer and Leah A. Boyer, his wife, citiz*ne*s of the State of California and residents of the county of Imperial in said state, Jasper Thomason, a citizen of California and a resident of Orange County in said state, Robert B. Walker a citizen of the state of Iowa and a resident therein, A-1 Company, B-1 Company, C-1 Company, Imperial Water Company No. 1, Imperial Water Company No. 3, Imperial Water Company No. 5, all corporations organized and existing under and by virtue of the laws of the State of California, and John Doe, Richard Doe, John Roe, Richard Roe, Sarah Doe, Jane Doe, Sarah Roe, and Jane Roe, citizens of the State of California and residents in the aforesaid district.

And for cause of action against defendants named in the paragraph aforesaid, plaintiff states:

1. That on or about the 1st day of January, 1916, in the County of Beaver, State of Utah, said defendants, Friend J. Austin and Lettie M. Austin, his wife, for a valuable and adequate consideration, made and executed their joint and promissory note in writing, bearing date on that date, and delivered the same to the Delta Land & Water Company, a corporation organized and existing under and by virtue of the laws

of the State of Utah. By the terms of said note said Friend J. Austin and Lettie M. Austin, his wife, promised to pay the Delta Land and Water Company or order at its office in Milford, Beaver County, Utah, Fifty-five thousand ($55,000) dollars, in installments of Five thousand ($5000) dollars each, payable respectively on or before three, four, five, six and seven years after date, and three additional installments of Ten thousand ($10,000) dollars each, payable respectively on or before eight, nine and ten years after date, together with interest payable annually on January 1st of each year commencing with the year 1917, on each and all of said installments, at the rate of six per cent per annum from date thereof until maturity; and promised, further, that if default should be made and continue for thirty days in the payment of any installment of said principal or interest or any part thereof, the unpaid principal of said note and all accrued interest thereon should become immediately due and payable at the option of the legal holder thereof.

2. Said defendants, Friend J. Austin and Lettie M. Austin, his wife, to secure the payment of said promissory note, according to the tenor thereof, did at said time and place execute and deliver to the defendant, Peoples Abstract & Title Company, for the benefit of said Delta Land and Water Company a certan trust deed and mortgage, also bearing date on the 1st day of January 1916, by the terms of which they transferred and conveyed to the Peoples Title & Abstract Company, as trustee, for the use and benefit of the Delta Land and Water Company, the following described premises, situate in Imperial County, California, to wit:

> The east one-half of Section Twenty, Township Twelve South, Range Fourteen East, San Bernardino Meridian; containing 320 acres, more or less;

together with three hundred shares of the capital stock of Imperial Water Company No. 3, a corporation organized and existing under the laws of California, evidenced by certificates Nos. 139 and 463 for 150 shares each, which, by the terms of said certificates and by-laws of said water company, are appurtent to the lands aforesaid.

That said deed of trust was on the uses and terms therein set forth, and a copy of said deed of trust is set out at length in the original bill of complaint herein, and is hereby referred to and made a part of this supplemental bill of complaint with the same force and effect as if copied herein at length.

That said trust deed and mortgage was also signed by the Delta Land & Water Company and by The Peoples Abstract & Title Company on or about the said first day of January, 1916, and the said trust deed and mortgage was duly executed and certified by all of the parties executing the same, so as to entitle it to be recorded, and the said trust deed was afterwards, to wit, on the 30th day of March, 1916, duly recorded in the office of the county recorder of the county of Imperial, state of California, in book 107 of deeds, page 351.

3. That the said defendants, Friend J. Austin and Lettie M. Austin, his wife, as security for the payment of the said promissory note according to the tenor

thereof, did at the same time and place transfer and assign to the Delta Land & Water Company that certain promissory note of the defendant, Annie Marie Belford, dated June 20th, 1914, in the principal sum of Ten thousand dollars due five years after date, payable to the defendant, Friend J. Austin, bearing interest at the rate of eight per cent per annum, payable semiannually, and the mortgage of said defendant, Annie Marie Belford, securing said promissory note. By said mortgage, the mortgagors mortgaged to the mortgagee real property situate in Imperial County, State of California, to wit:

> Northeast quarter of Section 8, Tp. 14 South, R. 16 East, S. B. M. 160 acres according to plat of Survey approved Oct. 18, 1856, being southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter, Lots 8 and 10, Sec. 3, Tp. 14 South, R. 16 East, S. B. M., California, containing 141.95 acres, according to plat of resurvey approved Nov. 4, 1908, together with one hundred and thirty-four (134) shares of the capital stock of Imperial Water Co. #5 evidenced by certificate #2303 of said Imperial Water Co. #5.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

That said note and mortgage are set forth at length in the original bill of complaint herein, and are hereby

referred to and made a part hereof with the same force and effect as though copied at this point at length.

That the aforesaid mortgage of the defendant Annie Marie Belford to the defendant Friend J. Austin was recorded on June 22, 1914, in Book 30, page 142, et seq. of mortgages, Imperial County record, California.

4. That said defendants, Friend J. Austin and Lettie M. Austin, his wife, as further security for the payment of said promissory note of January 1st, 1916, according to the tenor thereof, did at the same time and place transfer and assign to the Delta Land & Water Company that certain promissory note of one Joseph Carrick, dated March 3, 1915, for the principal sum of $12000.00, payable to the order of Friend J. Austin five years after date, with interest at the rate of 8 per cent per annum, payable semiannually, and a mortgage of said Joseph Carrick, as mortgagor, to Friend J. Austin, as mortgagee, upon the southwest quarter of Section 4, Township 12 South, Range 15 East, San Bernardino Meridian, in Imperial County, California, and 150 shares of the stock of Imperial Water Company No. 3, issued to the said Joseph Carrick, and assigned by said Joseph Carrick to the said Friend J. Austin, which said mortgage is recorded in book 35, page 183, mortgages, in said Imperial county records.

5. That thereafter and on or about the 2nd day of January, 1917, the N. and E. J. Allen Company, a corporation, in due course of business, for a valuable and adequate consideration, and prior to maturity, pur-

chased and acquired of and from the Delta Land & Water Company, and the Delta Land & Water Company at said time endorsed, transferred and assigned to said N. & E. J. Allen Company the aforesaid promissory note executed January 1, 1916, by Friend J. Austin and Lettie M. Austin, and also the aforesaid promissory note and mortgage of the defendant Annie Marie Belford, dated June 20, 1914, and the aforesaid promissory note and mortgage of Joseph Carrick, dated March 3, 1915, and on or about the 5th day of March, 1917, said Frances Investment Company, plaintiff herein, in due course of business prior to maturity and for a valuable consideration purchased and acquired from said N. & E. J. Allen Company the aforesaid notes and mortgages and each of them, and ever since said 5th day of March, 1917, plaintiff has been and now is the lawful owner and holder of said promissory notes and mortgages and each of them. That on or about the date of the assignments thereof to it, as aforesaid, the plaintiff duly notified the said Annie Marie Belford and Joseph Carrick that their respective notes and mortgages had been sold and assigned to it, and on or about the 30th day of November, 1917, the plaintiff notified the defendant The Peoples Abstract & Title Company in writing that the aforesaid promissory note of the defendants Friend J. Austin and Lettie M. Austin had been assigned to it, and that it, the plaintiff, was the lawful owner and holder of same. That on the 30th day of November, 1917, the plaintiff caused to be recorded in book 5, page 1, of Assignments, Imperial County records, California, the assignment by the Delta Land & Water Company to the plaintiff of

the aforesaid promissory note and mortgage of the defendant Annie Marie Belford hereinbefore set forth, and on the 30th day of November, 1917, caused to be recorded in book 5, page 2, of Assignments, Imperial County Records, California, the assignment by the Delta Land & Water Company to the plaintiff of the aforesaid note and mortgage of Joseph Carrick.

6. That no part of the principal of said promissory note of the defendants Friend J. Austin and Lettie M. Austin, has been paid, except the sum of $1965.45, which was paid on account of such interest at or about the time of the purchase of said note by the plaintiff, in consequence whereof this plaintiff has elected to and hereby does declare the principal of said note, together with all accrued and unpaid interest thereon, to be now due and payable.

7. That no part of the principal or interest of said promissory note of the defendant Annie Marie Belford has been paid, except the interest thereon to July 20, 1917. in consequence whereof the plaintiff has elected to, and hereby does, declare the principal of said note, together with the interest thereon from the 20th day of July, 1917, to be now due and payable.

8. That on the 2nd day of October, 1917, the defendants, Friend J. Austin, and Lettie M. Austin, his wife, and the defendants William Martin Belford and Annie Marie Belford, his wife, with intent and design to cheat and defraud the plaintiff out of its security, as aforesaid, did file their verified petition in the office of the Clerk of the Superior Court of the County of Imperial, State of California, praying for a decree of

said Court directing the registration of title free and clear from said security under the terms and conditions of that certain law enacted by the people of the State of California, adopted and passed at the general election held on November 3, 1914, entitled "An Act to Amend an Act entitled, "An Act for the Certification of Land Titles and the Simplification of the Transfer of Real Estate', approved March 17, 1887", and pursuant to, and as a part of their scheme to defraud and injure the plaintiff and the Delta Land & Water Company, and to deceive the said Superior Court of California for the County of Imperial, through their attorney, H. F. Davis, did procure, by false and fraudulent affidavits, from the Honorable Franklin J. Cole, findings of fact and decree, by which the land described in the deed of trust and mortgage aforesaid was registered in the name of said defendants Friend J. Austin and Lettie M. Austin, his wife, and defendants William Martin Belford and Annie Marie Belford, his wife, free and clear of the said deed of trust and mortgages; that said findings of fact and decree were made on the 7th day of December, 1917, and filed in said court, and on the 13th day of December, 1917, a certificate of title, No. 74, under said Act, was issued by the Registrar of said Imperial County, showing title to said property to be vested in said defendant Friend J. Austin and Lettie M. Austin, his wife, as community property.

That the several facts and circumstances and the fraudulent means and methods of the before mentioned defendants are set forth at length in the original bill

of complaint herein, and are hereby referred to and made a part hereof with the same force and effect as if copied herein at this point.

9. That subsequent to the second day of October, 1917, and prior to the 13th day of December, 1917, the defendants William Martin Belford and Annie Marie Belford sold, transferred and conveyed by instrument of conveyance to the defendants Friend J. Austin and Lettie M. Austin all of their right, title and interest in and to the property described in the aforesaid mortgage of Annie Marie Belford of date June 20, 1914, and that the said defendants Friend J. Austin and Lettie M. Austin are now the owners of the legal fee to said property.

10. That the plaintiff herein and the said Delta Land & Water Company, and each of them, have now, and did have during all of the times herein mentioned, a good, sufficient and meritorious defense to the aforesaid action to register title brought by the defendants Friend J. Austin, Lettie M. Austin, Annie Marie Belford and William Martin Belford, hereinbefore set forth, in so far as the same sought to invalidate or injuriously affect the rights and interests of the beneficiary under said trust deed of January 1, 1916, and the rights and interests of the holder of the aforesaid note and mortgage of Annie Marie Belford of date June 20, 1914. That the plaintiff was a bona fide purchaser for value before maturity of the aforesaid note of the defendants Friend J. Austin and Lettie M. Austin of date January 1, 1916, and of the aforesaid promissory note of Annie Marie Belford and the mortgage

securing same of date June 20, 1914; that each and every one of the allegations contained in said application to register title as to false and fraudulent statements and representations alleged to have been made by the Delta Land and Water Company, its agents, servants or employees, to the defendants Friend J. Austin and Lettie M. Austin, or either of them, is false and untrue.

11. That neither the plaintiff, nor the Delta Land & Water Company had any knowledge or information of the institution or pendency of the aforesaid action to register title, or of any of the proceedings had or taken therein as hereinbefore set forth, prior to about the 28th day of December, 1917.

12. The plan or scheme to defraud the Delta Land & Water Company and procuring the fraudulent registration of the title to said land as aforesaid, was conceived by the defendant H. F. Davis, and at all times herein mentioned said defendant H. F. Davis acted as the attorney and agent for the defendants Friend J. Austin and Lettie M. Austin, William Martin Belford and Annie Marie Belford, in the furtherance and execution of said plan or scheme.

Said defendant Meryl J. Davis is, and at all times herein mentioned, was the wife of defendant H. F. Davis; that said defendant Jasper Thomason is and at all times herein mentioned was the father of said defendant Meryl J. Davis; and the defendant T. P. Banta is and at all times herein mentioned was the father of one Banta, who is and at all times herein mentioned was the law partner of defendant H. F.

Davis; and the defendant John W. Austin is and at all times herein mentioned was a real estate and mortgage broker, with his office in Los Angeles, California.

That on or about December 1st, 1917, at the town of El Centro, California, said defendants H. F. Davis, Meryl J. Davis, Friend J. Austin and Lettie M. Austin conspired, confederated and agreed *betwee* themselves and each other to sell the property above described, if the same should be registered in said proceeding, and to conceal and secrete the funds and assets realized by the sale thereof, and all for the purpose of cheating and defrauding said Delta Land & Water Company.

That on or about December 13, 1917, at Los Angeles, California, defendants H. F. Davis, Meryl J. Davis John W. Austin, Jesse Boyd Pilcher and Jasper Thomason conspired, confederated and agreed between themselves and each other to further said conspiracy, to conceal said funds and assets and to assist in the execution thereof.

13. That on or about the 14th day of December, 1917, said defendants, Friend J. Austin and Lettie M. Austin, his wife, made, executed and delivered their deed, by which they conveyed to Jasper Thomason as his separate property, the southwest quarter of section 4, Township 12 South, Range 15 East, San Bernardino Meridian; that on said day said deed of conveyance was registered in Torrens Certificate No. 77 in the office of the Registrar of Torrens titles in said County of Imperial, State of California.

That on the 14th day of February, 1918, said Jasper Thomason made and executed his deed, by which he

conveyed the last described property to Jesse Boyd Pilcher, as his separate property. That on said day said deed was registered with said Registrar and Torrens Certificate No. 85, on said property, was issued to said Jesse Boyd Pilcher, by said Registrar.

That on the 11th day of February, 1918, said defendant Jesse Boyd Pilcher had made and executed his mortgage upon said real property to defendant John W. Austin, for the sum of $8500.00, and said Certificate No. 85 showed said mortgage as an incumbrance on said property.

That on the 15th day of February, 1918, the said defendant Jesse Boyd Pilcher made and executed his deed, by which he conveyed the said property to said defendant Harry D. Aron, as his separate property. That on said day said deed was registered with said Registrar and Torrens Certificate No. 87 on said property was issued to said defendant Harry D. Aron by said Registrar.

That on the 2nd day of October, 1918, defendant John W. Austin assigned said mortgage for $8500.00 to defendant T. P. Banta, and said Certificate No. 87 showed the said mortgage as assigned to be an incumbrance on said property. Said mortgage was thereafter assigned, on May 5, 1919, by said defendant T. P. Banta to John W. Wolfe, as shown by said Certificate No. 87.

That on or about June 23, 1919, defendant Harry D. Aron executed his deed, by which he conveyed said property to defendant Robert B. Walker as his separate property, and said deed was registered in Torrens

Certificate No. 120 in the office of the Registrar of Torrens titles in the County of Imperial, State of California.

That on or about December 14, 1917, said defendants Friend J. Austin and Lettie M. Austin, his wife, made and executed their deed, by which they conveyed to defendant Jasper Thomason, as his separate property, the east half of Section 20, Township 12 south, Range 14 east, San Bernardino Meridian. Said deed was registered with said Registrar and Torrens Certificate No. 76 was by him issued to said defendant Jasper Thomason on said property.

That on the 13th day of February, 1918, the said defendant Jasper Thomason transferred said premises to defendants Thomas Edwin Gill and Myra Ritzinger Gill, his wife, as joint tenants, On said day said deed was registered with said Registrar and Torrens certificate No. 84 on said property was issued by said Registrar to said defendants Thomas Edwin Gill and Myra Ritzinger Gill.

That on or about December 14, 1917, said defendants, Friend J. Austin and Lettie M. Austin, his wife, by Torrens certificate No. 78 in said Imperial County conveyed the Northeast quarter of Section 8, Township 12 South, Range 16 East, to defendant Jasper Thomason, and on the 14th day of February, 1918, said defendant Jasper Thomason, by Torrens certificate No. 86 in said Imperial County, conveyed said premises to defendant Jesse Boyd Pilcher, and on the 18th day of February, 1918, said Jesse Boyd Pilcher made and executed a mortgage upon said premises in favor of defendant John W. Austin, for the sum of $5,000.

That on the 15th day of February, 1918, said defendant Jesse Boyd Pilcher, by Torrens certificate No. 88 in said Imperial County, conveyed said property to defendant, Harry D. Aron, subject to the aforesaid mortgage of said defendant John W. Austin; that on the 2nd day of March, 1918, said mortgage was assigned by said defendant John W. Austin to defendant Waller Bruce Watt, who on March 4, 1918, assigned the same to the Security Commercial & Savings Bank of El Centro, a corporation, which bank thereafter, on the 30th day of April, 1918, assigned the same to said William H. Watt.

14. That the aforesaid transfers, certificates, assignments and conveyances and each and every of them were made and accepted by the defendants and each of them, with full knowledge of the rights of the plaintiff under the aforesaid deed of trust and mortgages, and with full knowledge that said decree of registration was procured by fraud, as aforesaid, and said transfers, certificates, assignments and conveyances were made without consideration, except as hereinafter expressly alleged.

15. That said transfers and conveyances from defendants Friend J. Austin and Lettie M. Austin, mesne conveyances, to said defendants Thomas Edwin Gill and Myra Ritzinger Gill, as aforesaid, were made upon the following sonsideration, to-wit:

The conveyance of certain town lots in the City of Phoenix, State of Arizona, by said defendants Thomas Edwin Gill and Myra Ritzinger Gill to the defendant Meryl J. Davis, and the conveyance by said defendants Thomas Edwin Gill and Myra Ritzinger Gill to the de-

fendant Jasper Thomason, of the following described property, viz:

The Southwest quarter of the North half of Tract 47, Township 15 S., R. 14 East, San Bernardino Meridian, together with thirty-two shares of the capital stock of Imperial Valley Water Company No. 1; also the Southeast quarter of the north half of Tract 48, Township 15 South, Range 14 East, San Bernardino Meridian, together with thirty-eight shares of the capital stock of Imperial Water Company No. 1. The deed of conveyance was dated February 9, 1918, acknowledged February 11, 1918, and recorded February 13, 1918, in book 130 of Deeds, page 375 Records of Imperial County, California.

That on or about February 15, 1918, said defendant Jasper Thomason conveyed the property last described by deed of conveyance to said defendant John W. Austin, and said deed was acknowledged February 16, 1918, and recorded February 18, 1918, in book 130 of Deeds, page 411, Records of Imperial County, California.

That on or about May 5, 1919, the said property last described was transferred, by said defendant John W. Austin and said defendant Laura A. Austin by their deed of conveyance, to defendant T. P. Banta, and said deed of conveyance is recorded in book 144 of Deeds, at page 138, Records of Imperial County, California; and said property now stands of record in the name of said defendant T. P. Banta.

That said transfers from said defendants Thomas Edwin Gill and Myra Ritzinger Gill to said defendant

Jasper Thomason, and from said defendant Jasper Thomason to defendant John W. Austin, and from said defendants John W. Austin and Laura A. Austin to said T. P. Banta, were each and every of them without any consideration whatever.

That on or about May 5, 1919, said town lots, located in the city of Phoenix, State of Arizona, as aforesaid, were transferred by defendants Meryl J. Davis and H. F. Davis, by their deed of conveyance, to John W. Wolfe, and at the same time said defendant Banta assigned and transferred to said Wolfe a certain mortgage, for and in the sum of $8,500, theretofore assigned to said defendant Banta by defendant John W. Austin as aforesaid; said mortgage being on the East half of Section 20, Township 12 South, Range 14 East, San Bernardino Meridian as aforesaid.

That said transfer, conveyance and assignment of said town lots and said mortgage to said John W. Wolfe were upon the following consideration, to wit:

The conveyance by said John W. Wolfe to the defendant Meryl J. Davis of the north eighty-one acres of Tract 68, together with a certificate representing sixty-five shares of the stock of Imperial Water Company No. 1, and all the stock and personal property on said real property; said conveyance being by deed of conveyance made on or about May 5, 1919, and recorded on said date in book 144 of deeds, page 134, Records of Imperial County, California. That on or about November 13, 1919, by deed of conveyance dated October 25, 1919, said defendants H. F. Davis and Meryl J. Davis transferred and conveyed to defend-

ants Wade N. Boyer and Leah A. Boyer the real estate above described, together with said water stock and personal property; said deed of conveyance being recorded in book 153 of deeds, page 149, records of Imperial County, California.

That said transfer from the defandants H. F. Davis and Meryl J. Davis to the defendants Wade N. Boyer and Leah A. Boyer was without any consideration whatever and under the following circumstances, to wit: One J. D. De Lozier levied an attachment on said property on October 28, 1919, in a suit against the defendants H. F. Davis and Meryl J. Davis, for commissions alleged to have arisen out of the transactions above described between said H. F. Davis, and Meryl J. Davis and said John W. Wolfe. That thereupon, in the attempt to defeat said attachment, defendants H. F. Davis and Meryl J. Davis placed on record, as aforesaid, on November 13, 1919, the said deed purporting to bear date October 25, 1919, but the true date of which is to plaintiff unknown.

16. That on or about December 14, 1917, the said Southeast quarter of the Northwest quarter, the Southwest quarter of the Northeast quarter, and Lots 8 and 10, all in Section 3, Township 14 South, Range 16 East, San Bernardino Meridian, was transferred by Torrens certificate from said defendant Friend J. Austin to said defendant Jasper Thomason, and on February 14, 1918, from said defendant Jasper Thomason to defendant Jesse Boyd Pilcher, and on or about February 14, 1918, said defendant Jesse Boyd Pilcher executed a mortgage upon said property to said defendant

John W. Austin, to secure a note for $5,000; said mortgage being dated February 11, 1918, and registered February 14, 1918, all as aforesaid.

That on or about March 2nd, 1918, the said mortgage was assigned by the said defendant John W. Austin to Waller Bruce Watt, as aforesaid. The said assignment was in consideration of the transfer by said Waller Bruce Watt to the defendant John W. Austin of the following described property:

The West half of the Southwest quarter of the southwest quarter of Section 18, Township 4 South, Range 10 West, San Bernardino Meridian, situated and being in the City of Stanton, County of Orange, State of California, together with the assignment by said Waller Bruce Watt to said defendant John W. Austin of an undivided one half interest to the pumping plant and appurtenances of said property; said assignment having been made on March 1st, 1918, and said transfer was by deed of conveyance dated February 28, 1918, and recorded March 1, 1918, in *gook* of deeds, Vol. 318, page 220, Records of Orange County, California.

That on or about May 6, 1918, defendants John W. Austin and Laura A. Austin, his wife, transferred to defendant Meryl J. Davis by their deed of conveyance, the above described property and said deed was recorded May 7, 1918, in Book of deeds, Vol. 319, page 355, Records of Orange County, California, together with an undivided one half interest in said pumping plant.

That on or about November 19, 1919, Defendants Meryl J. Davis and H. F. Davis conveyed to Frances

R. Wilson and A. M. Wilson, her husband, and Bertha Edgar and W. C. Edgar, her husband, the property above described, together with an undivided one half interest in and to said pumping plant, at the same time reserving unto said defendant Meryl J. Davis a mortgage for and in the sum of $5,500, that said transfer was by deed of conveyance, dated November 19, 1919, and recorded Decembar 11, 1919, in book 346 of deeds, page 162, records of Orange County.

That said described real property now stands in the names of said Frances R. Wilson and A. M. Wilson, her husband, and Bertha Edgar and W. C. Edgar, her husband, subject to a mortgage in favor of defendant Meryl J. Davis, for and in the sum of $5,500, and said transfer from said defendants John W. Austin and Laura A. Austin to *defednant* Meryl J. Davis was without any consideration whatever.

17. That in equity and good conscience plaintiff is entitled to the said North eighty-one acres of Tract 68, Township 15 South, Range 13 East, San Bernardino Meridian, Imperial County, California, together with the said sixty-five shares of stock of Imperial Water Company No. 1, and the stock and personal property thereon, and said plaintiff is likewise in equity and good conscience entitled to said *morttage* in favor of the said defendant Meryl J. Davis, on the said West half of the Southwest quarter of the Southwest quarter in Section 18, Township 4 South, Range 10 West, San Bernardino Meridian, situated in the City of Stanton, County of Orange, as aforesaid, and said plaintiff is likewise in equity and good conscience en-

titled to the said real property in Imperial County standing in the name of said defendant T. P. Banta, as aforesaid.

18. That subsequent to the filing of the original bill of complaint herein, to wit, after February 15, 1918, said defendants Friend J. Austin and Lettie M. Austin, Thomas Edwin Gill and Myra Ritzinger Gill, and Harry D. Aron conspired and confederated together to further defraud the Delta Land & Water Company, by depriving it of the water stock aforesaid, and in order to carry out the same, wilfully and fraudulently failed and neglected to pay the assessments due thereon, so that the same was sold to said defendants Thomas Edwin Gill and Myra Ritzinger Gill and Harry D. Aron for non-payment of assessments.

19. That said defendant and each of them claims to have some right, title, interest, or lien, in or upon the above described premises, or some part thereof, as purchasers, mortgagees, judgment creditors, or otherwise, but such right, title, interest, or lien if any they have, are each and all of them subsequent, subject and subordinate to the title, interest and lien of the trust deed and mortgages of plaintiff hereinabove mentioned, and to the rights of the plaintiff thereunder, and also to the rights of the plaintiff in equity and good conscience as aforesaid.

WHEREFORE, plaintiff prays that it may have the relief prayed for in its original prayer in the original bill of complaint herein, and that all of the defendants herein named, and all persons claiming under them

subsequent to the execution of the aforesaid deed of trust and mortgages belonging to plaintiff, be barred and forever foreclosed of all rights, claims or equity of redemption on said property conveyed by said deed of trust, and said mortgages and every part thereof.

That defendants be required to surrender up the certificates of water stock, wrongfully acquired by reason of said delinquent sales as aforesaid, and said defendant Imperial Water Company No. 1; said Imperial Water Company #3, and said Imperial Water Company No. 5, be required to recognize the aforesaid certificates of plaintiff.

That defendant Meryl J. Davis and defendant H. F. Davis be required to transfer and convey to plaintiff said mortgage on said property in Orange County, above described, and said defendants Wade M. Boyer and Leah A. Boyer, be required to transfer and convey to plaintiff the real property now standing in their name as aforesaid, together with sixty-five shares of capital stock of the Imperial Water Company No. 1. as aforesaid, and the live stock and personal property on said premises, and defendant T. P. Banta be required to transfer and convey to plaintiff the said real property standing in his name.

That defendants and each of them be enjoined, during the pendency of this suit from in any manner disturbing the present status to the above described property.

That plaintiff may have such other and further relief in the premises as to this Court may seem meet and equitable.

And may it please your Honors to grant to this plaintiff a writ or writs of subpoena directed to the said defendants named in this supplemental bill of complaint who are not named in the original bill of complaint, and each of them issue out of and under the seal of this Honorable Court; thereby commanding them at a certain time and under a certain penalty, therein to be named, personally to be and appear before this Court, then and there civilly to make full and true answer to this supplemental bill of complaint not under oath (such answer under oath being hereby expressly waived) and to show cause, if any there be, why the prayer of the bill of complaint herein and of this supplemental bill of complaint should not be granted according to the rule and practice of this Court, and to stand, to perform and abide by such order, direction and decree as may be made against them in the premises, and as shall seem meet to equity and good conscience.

And your plaintiff, as in duty bound, will ever pray, etc.

Wm. Story, Jr.,
Joseph L. Lewinsohn,
Solicitors for Plaintiff.

[Endorsed]: D 61 Eq UNITED STATES DISTRICT COURT Southern District of California Southern Division FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, vs. FRIEND J. AUSTIN, et al., Defendants. SUPPLEMENTAL BILL IN EQUITY FILED JAN 23 1920 CHAS. N. WILLIAMS, Clerk By R. S. Zimmerman Deputy Clerk Wm Story Jr JOSEPH L. LEWINSOHN Los Angeles, Cal. Lissner Bldg. Attorney for plaintiff.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

FRANCES INVESTMENT)
COMPANY, a corporation,)
) ORDER FOR
Plaintiff,) SERVICE OF
vs.) SUBPOENAS
FRIEND J. AUSTIN, et al.,)
Defendants.)

Good cause appearing therefor, it is ordered that subpoena ad respondendum issue as prayed for in the supplemental complaint and that same, together with restraining order herein may be served on the defendants found or residing outside of Los Angeles County by private person or persons.

DATED this 23rd day of January, 1920.

BLEDSOE

Judge

[Endorsed]: D 61 No. D 61 in Equity United States District Court Southern District of California Southern Division FRANCES INVESTMENT CO., a corporation, Plaintiff vs. FRIEND J. AUSTIN, et al. Defendants ORDER FOR SERVICE OF SUBPOENAS FILED JAN 23 1920 CHAS. N. WILLIAMS Clerk, By R S Zimmerman Deputy Clerk LISSNER & LEWINSOHN Attorneys at Law Lissner Building Los Angeles, Cal. Attorney for Plaintiff

UNITED STATES OF AMERICA

District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

In Equity

The President of the United States of America, Greeting!

To Friend J. Austin, Lettie M. Austin, his wife, William Martin Belford, Annie Marie Belford, his wife, The Peoples Abstract & Title Company, a corporation, H. F. Davis and Meryl J. Davis, his wife, John W. Austin and Laura A. Austin, his wife, Jasper Thomason, Jesse Boyd Pilcher, Thomas Edwin Gill and Myra Ritzinger Gill, his wife, Harry D. Aron, T. P. Banta, Robert B. Walker, John Doe, Richard Doe, John Roe, Richard Roe, Sarah Doe, Jane Doe, Sarah Roe, Jane Roe, A-1 Company, a corporation, B-1 Company, a corporation, C-1 Company, a corporation, Imperial Water Company No. 1, Imperial Water Company #3, Imperial Water Company #5, Wade M. Boyer and Leah A. Boyer, his wife.

You Are Hereby Commanded, That you be and appear in said District Court of the United States aforesaid, at the Court Room in Los Angeles, California on or before the twentieth day, excluding the day of service, after service of this subpoena upon you, to answer a Supplemental Bill of Complaint exhibited against you in said Court by The Frances Investment Company, a corporation organized under the laws of

the State of Utah and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

Witness, The Honorable BENJAMIN F. BLEDSOE, Judge of the District Court of the United States, this 23rd day of January in the year of our Lord one thousand nine hundred and twenty and of our Independence the one hundred and forty Fourth

(Seal) Chas. N. Williams

Clerk.

By R S Zimmerman,

Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, OF RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, PROMULGATED BY THE SUPREME COURT, NOVEMBER 4, 1912.

On or before the twentieth day after service of the subpoena, excluding the day thereof, the defendant is required to file his answer or other defense in the Clerk's Office;

otherwise the Bill may be taken pro confesso.

Chas. N. Williams

Clerk.

By R S Zimmerman

Deputy Clerk

UNITED STATES MARSHAL'S OFFICE }
SOUTHERN DISTRICT OF CALIFORNIA } ss:

I Hereby Certify, That I received the within writ on the 26th day of January, 1920, and personally served the same on the 29th day of January, 1920, on John W. Austin Mrs. John W. Austin, Thos E. Gill, Mrs. Thos E. Gill and Harry Aron by delivering to and leaving with John W. Austin, Mrs. John W. Austin by leaving copy with John W. Austin, husband; Thos E. Gill, Mrs. Thos. E. Gill by leaving copy with Thos E. Gill, Mrs. Thos. E. Gill, by leaving copy with Thos. E. Gill, husband; and Harry Aron said defendants named therein, personally, at the County of Los Angeles in said district, a copy thereof..............

C. T. Walton,
U. S. Marshal,
By W. S. Walton
Deputy.

Los Angeles,
January 30, 1920.

[Endorsed]: Marshal's Civil Docket No. 3918 No. D 61 Eq U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division IN EQUITY Frances Investment Co., vs. Friend J. Austin, et al. SUBPOENA FILED MAR 17 1920 CHAS. N. WILLIAMS Clerk By Emyr E. Jones Deputy Clerk

To the Marshal of the United States for the Southern Distric tof California:

Pursuant to Rule 12, the within subpoena is returnable into the Clerk's Office twenty days from the issuing thereof.

Subpoena Issued Jan 23, 1920

Chas N Williams
Clerk
By R S Zimmerman
Deputy Clerk

At a stated term, to wit: the January, A. D. 1920 term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court room thereof in the city of Los Angeles, on Monday, the second day of February in the year of our Lord one thousand nine hundred and twenty;

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge

Frances Investment Company,
Complainant,
vs.) No. D-61-Eq.
Friend J. Austin, et al.,
Defendants.

This cause came on this date for hearing on order to show cause, J. L. Lewinsohn, Esq., appearing as attorney for complainants; Duke Stone, Esq. appearing as counsel for defendants, H. F. Davis, Wade M. Boyer, and Leah A. Boyer; James E. Kelby, Esq.,

appearing as counsel for defendant Paul H. Marlay; and Frank Rouse Esq. appearing as counsel for defendants Thomas Edwin Gill and Myla Ritzinger Gill. Upon motion of Lewinsohn, Stone, Kelby and Rouse consenting thereto, it is ordered that the hearing of the order to show cause why the defendants should not be enjoined from performing certain acts specified in the temporary restraining order filed herein on January 27th, 1920 be continued to 10 A. M. Monday, February 16th, 1920; and upon motion of Lewinsohn, Stone, Kelby and Rouse consenting thereto, it is further ordered that said temporary restraining order remain in full force and *deffect* during such period and until the further order of the Court. Upon motion of Lewinsohn, and good cause appearing therefor, it is further ordered that the supplemental bill of complaint filed herein on January 23, 1920 be amended by substituting Paul H. Marlay as a party defendant in the place and stead of John Doe and by substituting F. M. Rubblee as a party defendant in the place and stead of Richard Roe.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation,
Plaintiff,
vs.
FRIEND J. AUSTIN, et al.,
Defendants.

In Equity. Eq. No. D-61.

NOTICE.

TO THE DEFENDANTS IN SAID CAUSE, and to Messrs. H. F. Davis, Duke Stone, Ralph Graham, James E. Kelby and Joseph Crail, their attorneys:

You and each of you will please take notice that on Monday, the 5th day of April, 1920, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, the above named plaintiff Frances Investment Company will appear before his Honor, Judge Bledsoe, in the room usually occupied by him as a court room, in the Federal Building, at Los Angeles, California, and ask leave to file an amended supplemental bill of complaint, a copy of which is served upon you herewith, and then and there will also apply for an order that the various motions and pleadings now on file, directed to the supplemental bill of complaint, may be considered as directed to said amended supplemental complaint.

Dated this 31st day of March, 1920.

Wm Story Jr.
Joseph L. Lewinsohn
Attorneys for plaintiff

[Endorsed]: Original. No. Eq. D-61. UNITED STATES DISTRICT COURT Southern District of California Southern Division FRANCES INVESTMENT COMPANY, Plaintiff, vs. FRIEND J. AUSTIN, et al., Defendants. NOTICE. Receipt of a copy of the within is hereby admitted this 31 day of March 1920 Duke Stone atty for part of Defts and Joe Crail Attorney for Edwin Gill Myra Gill FILED APR 3 1920 CHAS. N. WILLIAMS, Clerk Maury Curtis Deputy Clerk WM STORY, JR. and JOSEPH L. LEWINSOHN Second and Hill Streets Los Angeles, Cal. Attorneys for Plaintiff.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation,

Plaintiff,

vs.

FRIEND J. AUSTIN, LETTIE M. AUSTIN, his wife, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, his wife, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS and MERYLE T. DAVIS, his wife, JOHN W.

AUSTIN and LAURA A. AUSTIN, his wife, JASPER THOMASON, JESSE BOYD PILCHER, THOMAS EDWIN GILL and MYRA RITZINGER GILL, his wife, HARRY D. ARON, T. P. BANTA, ROBERT B. WALKER, JOHN DOE, RICHARD DOE, JOHN ROE, RICHARD ROE, SARAH DOE, JANE DOE, SARAH ROE, JANE ROE, A-1 Company, a corporation, B-1 Company, a corporation, C-1 Company, a corporation, IMPERIAL WATER COMPANY No. 1, IMPERIAL WATER COMPANY #3, IMPERIAL WATER COMPANY #5, WADE M. BOYER and LEAH A. BOYER, his wife, Defendants.	AMENDED SUPPLEMENTAL BILL IN EQUITY.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

Frances Investment Company, a corporation, organized and existing under and by virtue of the laws of Utah, and a resident of said state, with its principal place of business in the City of Salt Lake, State of Utah, leave of Court having been first had and obtained, brings this its supplemental bill against Thomas Edwin Gill and Myra Ritzinger Gill, his wife, Harry D. Aron, John W. Austin and Laura A. Austin, his wife, and Jesse Boyd Pilcher, citizens of the State of

California and residents of the County of Los Angeles in said state, H. F. Davis and Meryle T. Davis, his wife, and T. P. Banta, Wade N. Boyer and Leah A. Boyer, his wife, citizens of the State of California and residents of the county of Imperial in said state, Jasper Thomason, a citizen of California and a resident of Orange County in said state, Robert B. Walker, a citizen of the state of Iowa and a resident therein, A-1 Company, B-1 Company, C-1 Company, Imperial Water Company No. 1, Imperial Water Company No. 3, Imperial Water Company No. 5, all corporations organized and existing under and by virtue of the laws of the State of California, and John Doe, Richard Doe, John Roe, Richard Roe, Sarah Doe, Jane Doe, Sarah Roe and Jane Roe, citizens of the State of California and residents of the aforesaid district.

And for cause of action against defendants named in the paragraph aforesaid, plaintiff states:

1. That on or about the 1st day of January, 1916, in the County of Beaver, State of Utah, said defendants, Friend J. Austin and Lettie M. Austin, his wife, for a valuable and adequate consideration, made and executed their joint and promissory note in writing, bearing date on that date, and delivered the same to the Delta Land & Water Company, a corporation organized and existing under and by virtue of the laws of the State of Utah. By the terms of said note said Friend J. Austin and Lettie M. Austin, his wife, promised to pay the Delta Land & Water Company or order, at its office in Milford, Beaver County, Utah, Fifty-five thousand ($55,000) dollars, in installments

of Five thousand ($5000) dollars each, payable respectively on or before three, four, five, six and seven years after date, and three additional installments of Ten Thousand ($10,000) dollars each, payable respectively on or before eight, nine and ten years after date, together with interest payable annually on January 1st of each year commencing with the year 1917, on each and all of said installments, at the rate of six per cent per annum from date thereof until maturity; and promised, further, that if default should be made and continue for thirty days in the payment of any installment of said principal or interest or any part thereof, the unpaid principal of said note and all accrued interest thereon should become immediately due and payable at the option of the legal holder thereof.

2. Said defendants, Friend J. Austin and Lettie M. Austin, his wife, to secure the payment of said promissory note, according to the tenor thereof, did at said time and place execute and deliver to the defendant, Peoples Abstract & Title Company, for the benefit of said Delta Land & Water Company a certain trust deed and mortgage, also bearing date on the 1st day of January, 1916, by the terms of which they transferred and conveyed to the Peoples Title & Abstract Company, as trustee, for the use and benefit of the Delta Land & Water Company, the following described premises, situate in Imperial County, California, to wit:

> The East one-half of Section Twenty, Township Twelve South, Range Fourteen East, San Bernardino Meridian; containing 320 acres, more or less;

together with three hundred shares of the capital stock of Imperial Water Company No. 3, a corporation organized and existing under the laws of California, evidenced by certificates Nos. 149 and 463 for 150 shares each, which, by the terms of said certificates and by-laws of said water company, are appurtenant to the lands aforesaid.

That said deed of trust was on the uses and terms therein set forth, and a copy of said deed of trust is set out at length in the original bill of complaint herein, and is hereby referred to and made a part of this supplemental bill of complaint with the same force and effect as if copied herein at length.

That said trust deed and mortgage was also signed by the Delta Land & Water Company and by The Peoples Abstract & Title Company on or about the said first day of January, 1916, and the said trust deed and mortgage was duly executed and certified by all of the parties executing the same, so as to entitle it to be recorded, and the said trust deed was afterwards, to-wit, on the 30th day of March, 1916, duly recorded in the office of the County Recorder of the County of Imperial, state of California, in Book 107 of Deeds, page 351.

3. That the said defendants, Friend J. Austin and Lettie M. Austin, his wife, as security for the payment of the said promissory note according to the tenor thereof, did at the same time and place transfer and assign to the Delta Land & Water Company that certain promissory note of the defendant, Annie Marie Belford, dated June 20th, 1914, in the principal sum

of Ten thousand dollars due five years after date, payable to the defendant, *Freind* J. Austin, bearing interest at the rate of eight per cent per annum, payable semi-annually, and the mortgage of said defendant, Annie Marie Belford, securing said promissory note. By said mortgage, the mortgagors mortgaged to the mortgagee real property situate in Imperial County, State of California, to wit:

> Northeast quarter of Section 85, Tp. 14 South R. 16 East S. B. M. 160 acres according to plat of survey approved Oct. 18, 1856, being southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter, Lots 8 and 10, Sec. 3, Tp. 14 South, R. 16 East, S. B. M., California, containing 141.95 acres, according to plat of resurvey approved Nov. 4, 1908, together with one hundred and thirty-four (134) shares of the capital stock of Imperial Water Co. #5 evidenced by certificate #2303 of said Imperial Water Co #5.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

That said note and mortgage are set forth at length in the original bill of complaint herein, and are hereby referred to and made a part hereof with the same force and effect as though copied at this point at length.

That the aforesaid mortgage of the defendant Annie Marie Belford to the defendant Friend J. Austin was recorded on June 22, 1914, in Book 30, page 142, et seq. of mortgages, Imperial County records, California.

4. That said defendants, Friend J. Austin and Lettie M. Austin, his wife, as further security for the payment of said promissory note of January 1st, 1916, according to the tenor thereof, did at the same time and place transfer and assign to the Delta Land & Water Company that certain promissory note of one Joseph Carrick, dated March 3, 1915, for the principal sum of $12000.00, payable to the order of Friend J. Austin five years after date, with interest at the rate of 8 per cent per annum, payable semi annually, and a mortgage of said Joseph Carrick, a mortgagor, to Friend J. Austin, as mortgagee, upon the southwest quarter of Section 4, Township 12 South, Range 15 East, San Bernardino Meridian, in Imperial County, California, and 150 shares of the stock of Imperial Water Company No. 3, issued to the said Joseph Carrick, and assigned by said Joseph Carrick to the said Friend J. Austin, which said mortgage is recorded in book 35, page 183, mortgages, in said Imperial county records.

5. That thereafter and on or about the 2nd day of January, 1917, the N. and E. J. Allen Company, a corporation, in due course of business, for a valuable and adequate consideration, and prior to maturity, purchased and acquired of and from the Delta Land & Water Company, and the Delta Land & Water Company at said time endorsed, transferred and assigned

to said N. and E. J. Allen Company the aforesaid promissory note executed January 1, 1916, by Friend J. Austin and Lettie M. Austin, and also the aforesaid promissory note and mortgage of the defendant Annie Marie Belford, dated June 20, 1914, and the aforesaid promissory note and mortgage of Joseph Carrick, dated March 3, 1915, and on or about the 5th day of March, 1917, said Frances Investment Company, plaintiff herein, in due course of business prior to maturity and for a valuable consideration purchased and acquired from said N. & E. J. Allen Company the aforesaid notes and mortgages and each of them, and ever since said 5th day of March, 1917, plaintiff has been and now is the lawful owner and holder of said promissory notes and mortgages and each of them. That on or about the date of the assignments thereof to it as aforesaid, the plaintiff duly notified the said Friend J. Austin, Lettie M. Austin, Annie Marie Belford and Joseph Carrick that their respective notes and mortgages had been sold and assigned to it, and on or about the 30th day of November, 1917, the plaintiff notified the defendant The Peoples Abstract & Title Company in writing that the aforesaid promissory note of the defendants Friend J. Austin and Lettie M. Austin had been assigned to it, and that it, the plaintiff, was the lawful owner and holder of same. That on the 30th day of November, 1917, the plaintiff caused to be recorded in Book 5, page 1, of Assignments, Imperial County records, California, the assignment by the Delta Land & Water Company to the plaintiff of the aforesaid promissory note and mortgage of the defendant Annie Marie Belford

hereinbefore set forth, and on the 30th day of November, 1917, caused to be recorded in Book 5, page 2, of Assignments, Imperial County Records, California, the assignment by the Delta Land & Water Company to the plaintiff of the aforesaid note and mortgage of Joseph Carrick.

6. That no part of the principal of said promissory note of the defendants Friend J. Austin and Lettie M. Austin, has been paid, except the sum of $1965.45, which was paid on account of such interest at or about the time of the purchase of said note by the plaintiff, in consequence whereof this plaintiff has elected to and hereby does declare the principal of said note, together with all accrued and unpaid interest thereon, to be now due and payable.

7. That no part of the principal or interest of said promissory note of the defendant Annie Marie Belford has been paid, except the interest thereon to July 20, 1917, in consequence whereof the plaintiff has elected to, and hereby does, declare the principal of said note, together with the interest thereon from the 20th day of July, 1917, to be now due and payable.

8. That on the 2nd day of October, 1917, the defendants, Friend J. Austin, and Lettie M. Austin, his wife, and the defendants William Martin Belford and Annie Marie Belford, his wife, with intent and design to cheat and defraud the plaintiff out of its security, as aforesaid, did file their verified petition in the office of the Clerk of the Superior Court of the County of Imperial, State of California, praying for a de-

cree of said Court directing the registration of title free and clear from said security under the terms and conditions of that certain law enacted by the people of the State of California, adopted and passed at the general election held on November 3, 1914, entitled "An Act to Amend an Act entitled, 'An Act for the Certification of Land Titles and the Simplification of the Transfer of Real Estate,' approved March 17, 1887," and pursuant to and as a part of their scheme to defraud and injure the plaintiff and the Delta Land & Water Company, and to deceive the said Superior Court of California for the County of Imperial, through their attorney, H. F. Davis, did procure, by false and fraudulent affidavits, from the Honorable Franklin J. Cole, findings of fact and decree, by which the land described in the deed to trust and mortgage aforesaid was registered in the name of said defendants Friend J. Austin and Lettie M. Austin, his wife, and defendants William Martin Belford and Annie Marie Belford, his wife, free and clear of the said deed of trust and mortgages; that said findings of fact and decree were made on the 7th day of December, 1917, and filed in said court, and on the 13th day of December, 1917, a certificate of title, No. 74, under said Act, was issued by the Registrar of said Imperial County, showing title to said property to be vested in said defendant Friend J. Austin and Lettie M. Austin, his wife, as community property.

That the several facts and circumstances and the fraudulent means and methods of the before mentioned defendants are set forth at length in the

original bill of complaint herein, and are hereby referred to and made a part hereof with the same force and effect as if copied herein at this point.

9. That subsequent to the second day of October, 1917, and prior to the 13th day of December, 1917, the defendants William Martin Belford and Annie Marie Belford sold, transferred and conveyed by instrument of conveyance to the defendants Friend J. Austin and Lettie M. Austin all of their right, title and interest in and to the property described in the aforesaid mortgage of Annie Marie Belford of date June 20, 1914, and that the said defendants Friend J. Austin and Lettie M. Austin are now the owners of the legal fee to said property.

10. That the plaintiff herein and the said Delta Land & Water Company, and each of them, have now, and did have during all of the times herein mentioned, a good, sufficient and meritorious defense to the aforesaid action to register title brought by the defendants Friend J. Austin, Lettie M. Austin, Annie Marie Belford and William Martin Belford, hereinbefore set forth, in so far as the same sought to invalidate or injuriously affect the rights and interests of the beneficiary under said trust deed of January 1, 1916, and the rights and interests of the holder of the aforesaid note and mortgage of Annie Marie Belford of date June 20, 1914. That the plaintiff was a bona fide purchaser for value before maturity of the aforesaid note of the defendants Friend J. Austin and Lettie M. Austin of date January 1, 1916, and of the aforesaid promissory note of Annie Marie

Belford and the mortgage securing same of date June 20, 1914; that each and every one of the allegations contained in said application to register title as to false and fraudulent statements and representations alleged to have been made by the Land & Water Company, its agents, servants or employees, to the defendants Friend J. Austin and Lettie M. Austin, or either of them, is false and untrue.

11. That neither the plaintiff nor the Delta Land & Water Company had any knowledge or information of the institution or pendency of the aforesaid action to register title, or of any of the proceedings had or taken therein as hereinbefore set forth, prior to about the 28th day of December, 1917.

12. The plan or scheme to defraud the Delta Land & Water Company and procuring the fraudulent registration of the title to said land as aforesaid, was conceived by the defendant H. F. Davis, and at all times herein mentioned said defendant H. F. Davis acted as the attorney and agent for the defendants Friend J. Austin and Lettie M. Austin, William Martin Belford and Annie Marie Belford, in the furtherance and execution of said plan or scheme.

Said defendant Meryle T. Davis is, and at all times herein mentioned, was the wife of defendant H. F. Davis; that said defendant Jasper Thomason is and at all times herein mentioned was the father of said defendant Meryle T. Davis; and the defendant T. P. Banta is and at all times herein mentioned was the father of the law partner of defendant H. F. Davis; and the defendant John W. Austin is and at all times

herein mentioned was a real estate and mortgage broker, with his office in Los Angeles, California; that said defendant Harry B. Aron is and at all times herein mentioned was associated in business with said defendant John W. Austin; that defendant John Doe, whose true name is Paul H. Marley is and at all times herein mentioned was the father-in-law of said defendant Harry B. Aron, and defendant Jesse Boyd Pilcher is and at all times herein mentioned was a laborer having no financial responsibility.

That on or about December 13, 1917, at Los Angeles, California, defendants H. F. Davis, Meryl J. Davis, John W. Austin, Jesse Boyd Pilcher, John Doe and Jasper Thomason conspired, confederated and agreed between themselves and each other to further said conspiracy, to conceal said funds and assets and to assist in the execution thereof.

13. That on or about the 14th day of December, 1917, said defendants, Friend J. Austin and Lettie M. Austin, his wife, made executed and delivered their deed, by which they conveyed to Jasper Thomason, as his separate property, the southwest quarter of Section 4, Township 12 South, Range 15 East, San Bernardino Meridian; that on said day said deed of conveyance was registered in Torrens Certificate No. 77 in the office of the Registrar of Torrens titles in said County of Imperial, State of California.

That on the 14th day of February, 1918, said Jasper Thomason made and executed his deed, by which he conveyed the last described property to Jesse Boyd Pilcher, as his separate property. That on said day said deed was registered with said Registrar and

Torrens Certificate No. 85, on said property, was issued to said Jesse Boyd Pilcher, by said Registrar.

That on the 11th day of February, 1918, said defendant Jesse Boyd Pilcher had made and executed his mortgage upon said real property to defendant John W. Austin, for the sum of $8500.00, and said Certificate No. 85 showed said mortgage as an incumbrance on said property.

That on the 15th day of February, 1918, the said defendant Jesse Boyd Pilcher made and executed his deed, by which he conveyed the said property to said defendant Harry D. Aron, as his separate property. That on said day said deed was registered with said Registrar and Torrens Certificate No. 87 on said property was issued to said defendant Harry D. Aron by said Registrar.

That on the 2nd day of October, 1918, defendant John W. Austin assigned said mortgage for $8500.00 to defendant T. P. Banta, and said Certificate No. 87 showed the said mortgage as assigned to be an incumbrance on said property. Said mortgage was thereafter assigned, on May 5, 1919, by said defendant T. P. Banta to John W. Wolfe, as shown by said Certificate No. 87, and now stands in his name.

That on or about June 23, 1919, defendant Harry D. Aron executed his deed, by which he conveyed said property to defendant Robert B. Walker as his separate property, and said deed was registered in Torrens Certificate No. 120 in the office of the Registrar of Torrens titles in the County of Imperial, State of California.

That on or about December 14, 1917, said defendants Friend J. Austin and Lettie M. Austin, his wife, made and executed their deed, by which they conveyed to defendant Jasper Thomason, as his separate property, the east half of Section 20, Township 12 South, Range 14 east, San Bernardino Meridian. Said deed was registered with said Registrar and Torrens Certificate No. 76 was by him issued to said defendant Jasper Thomason on said property.

That on the 13th day of February, 1918, the said defendant Jasper Thomason transferred said premises to defendants Thomas Edwin Gill and Myra Ritzinger Gill, his wife, as joint tenants. On said day said deed was registered with said Registrar and Torrens certificate No. 84 on said property was issued by said Registrar to said defendants Thomas Edwin Gill and Myra Ritzinger Gill.

That on or about December 14, 1917, said defendants, Friend J. Austin and Lettie M. Austin, his wife, by Torrens Certificate No. 78 in said Imperial County conveyed the Northeast quarter of Section 8, Township 12 South, Range 16 East, to defendant Jasper Thomason, and on the 14th day of February, 1918, said defendant Jasper Thomason, by Torrens Certificate No. 86 in said Imperial County, conveyed said premises to defendant Jesse Boyd Pilcher, and on the 18th day of February, 1918, said Jesse Boyd Pilcher made and executed a mortgage upon said premises in favor of defendant John W. Austin, for the sum of $5,000.

That on the 15th day of February, 1918, said defendant Jesse Boyd Pilcher, by Torrens certificate No. 88 in said Imperial County, conveyed said property to defendant Harry D. Aron, subject to the aforesaid mortgage of said defendant John W. Austin; that on the 2nd day of March, 1918, said mortgage was assigned by said defendant John W. Austin to defendant Walter Bruce Watt, who on March 4, 1918, assigned the same to the Security Commercial & Savings Bank of El Centro, a corporation, which bank thereafter, on the 30th day of April, 1918, assigned the same to said William H. Watt, and said William H. Watt thereafter and some time prior to January 1, 1920, re-assigned the same to said defendant John W. Austin, and said reassignment is unrecorded.

14. That on or about February 9, 1918, in consideration of the conveyance to them as aforesaid, said defendants Thomas Edwin Gill and Myra Ritzinger Gill conveyed to said defendant Jasper Thomason three parcels of real property, situated in the City of Phoenix, County of Maricopa, State of Arizona, and bounded and particularly described as follows, viz:

Parcel No. 1. Lot 5 in and of Block "13" in and of Collins Addition to the City of Phoenix, according to the plat thereof of record in the office of the County Recorder of Maricopa County, in Book "I" of Maps, Page 11 thereof.

Parcel No. 2. Lots 19 & 20 in and of Block "13" in and of Collins Addition to the City of Phoenix, according to the plat thereof of record in the office of the County Recorder of Maricopa County in Book "I" of Maps page 11 thereof.

Parcel No. 3. Lot 4 in and of Highland Addition to the City of Phoenix, according to the plat thereof of record in the office of the County Recorder of Maricopa County, in Book "2" of Maps page 35 thereof.

Also conveyed to said defendant Jasper Thomason the Southwest quarter of the North half of Tract 47, Township 15 S., R. 14 East, San Bernardino Meridian together with thirty-two shares of the capital stock of Imperial Water Company No. 1; also the Southeast quarter of the north half of Tract 48, Township 15 South, Range 14 East, San Bernardino Meridian, together with thirty-eight shares of the capital stock of Imperial Water Company No. 1, and the deed to the latter property was acknowledged February 11, 1918, and recorded about February 13, 1918, in Book 130 of Deeds, page 375 Records of Imperial County, California.

That on or about February 15, 1918, said defendant Jasper Thomason conveyed said property in Phoenix, Arizona and the property last described by deed of conveyance to said defendant John W. Austin, and the deed to the latter was acknowledged February 16, 1918, and recorded about February 18, 1918, in Book 130 of Deeds, page 411, Records of Imperial County, California.

That on or about May 5, 1919, said property last described was transferred, by said defendant John W. Austin, and said defendant Laura A. Austin by their deed of conveyance, to defendant T. P. Banta, and said deed of conveyance is recorded in book 144 of Deeds, at page 138, Records of Imperial County, Cali-

fornia; and said property now stands of record in the name of said defendant T. P. Banta.

That on or about May 5, 1919, said defendant John W. Austin, by his deed of conveyance, transferred and conveyed said three parcels of real property, situated at Phoenix, Arizona, to defendant John Roe, whose true name is John W. Wolfe, and as a part of said transaction and at the same time said defendant T. P. Banta assigned said mortgage for eight thousand five hundred dollars ($8,500) to said Wolfe as aforesaid.

That in consideration of said transfer, conveyance and assignment of said Phoenix property and said mortgage to him, said John W. Wolfe conveyed to the defendant Meryle T. Davis the north eighty-one acres of Tract 68, in Township 15 S., R. 13 East, San Bernardino Meridian, together with a certificate representing sixty-five shares of the stock of Imperial Water Company No. 1, and all the stock and personal property on said real property; said conveyance being by deed of conveyance made on or about May 5, 1919, and recorded on said date in book 144 of Deeds, page 134, Records of Imperial County, California.

That on or about November 13, 1919, by deed of conveyance dated October 25, 1919, said defendants H. K. Davis and Meryle T. Davis transferred and conveyed to defendants Wade N. Boyer and Leah A. Boyer the real estate above described, together with said water stock and personal property; said deed of conveyance being recorded in book 153 of Deeds, page 149, records of Imperial County, California; and said

property now stands in the name of said defendants Wade N. Boyer and Leah A. Boyer.

15. That in consideration of the assignment of the mortgage for five thousand dollars ($5,000) to him as aforesaid, said Walter Bruce Watt conveyed to defendant John W. Austin the following described property, viz:

The West half of the Southwest quarter of the southwest quarter of Section 18, Township 4 South, Range 10 West, San Bernardino Meridian, situated and being in the City of Stanton, County of Orange, State of California; and said Watt further assigned to said defendant John W. Austin an undivided one-half interest to the pumping plant and appurtenances on said property; that said assignment was made on March 1, 1918, and said conveyance was by deed of conveyance dated February 28, 1918, and recorded March 1, 1918, in book of deeds, Vol. 318, page 220, Records of Orange County, California.

That on or about May 6, 1918, defendants John W. Austin and Laura A. Austin, his wife, transferred to defendant Meryle T. Davis by their deed of conveyance, the above described property, and said deed was recorded May 7, 1918, in Book of Deeds, Vol. 319, page 355, Records of Orange County, California, together with an undivided one half interest in said pumping plant.

That on or about November 19, 1919, defendants Meryle T. Davis and H. F. Davis conveyed to Frances R. Wilson and A. M. Wilson, her husband, and Bertha Edgar and W. C. Edgar, her husband, the

property above described, together with an undivided one half interest in and to said pumping plant; that said transfer was by deed of conveyance, dated November 19, 1919, and recorded December 11, 1919, in book 346 of deeds, page 162, records of Orange County.

That said described real property now stands in the names of said Frances R. Wilson and A. M. Wilson, her husband, and Bertha Edgar and W. C. Edgar, her husband.

16. That by the terms of said deed of trust and the said mortgages assigned to said Delta Land & Water Company as aforesaid, it was at all times herein mentioned the duty of the defendants Friend J. Austin, Lettie M. Austin, and their assigns to pay the assessments on shares of water stock pledged as aforesaid; that on or about February 15, 1918, said defendants Friend J. Austin and Lettie M. Austin assigned all their right, title and interest in and to said certificates numbered 149 and 463 to the defendants Thomas Edwin Gill and Myra Ritzinger Gill, and on or about the same date assigned all their right, title and interest in and to said certificates numbered 14 and 2303, to defendant Harry B. Aron and the defendant John Doe, whose true name is Paul H. Marley.

That on or about February 15, 1918, said defendants Friend J. Austin, Lettie M. Austin, Thomas Edwin Gill, Myra Ritzinger Gill, Harry B. Aron and Paul H. Marley conspired and confederated together further to defraud plaintiff, by depriving it of the water stock represented by the aforesaid certificates,

and in order to carry out the same wilfully and fraudulently failed and neglected to pay the assessments that were due or should become due thereon, by reason of which, on or about August 6, 1918, said certificates numbered 149 was sold for non payment of assessments and purchased by said defendants Thomas Edwin Gill and Myra Ritzinger Gill, and said certificate numbered 14 was on the same day sold for non-payment of assessments and purchased by defendant Harry B. Aron.

That further to defraud plaintiff, and on or about February 16, 1918, said defendants Friend J. Austin and Lettie M. Austin, Thomas Edwin Gill and Myra Ritzinger Gill caused said certificate number 463, that stood in the name of Pacific Mutual Life Insurance Company as pledgee for defendant Lettie M. Austin as aforesaid, to be transferred to said Pacific Mutual Life Insurance Company, as pledgee for said defendants Thomas Edwin Gill and Myra Ritzinger Gill.

That further to defraud plaintiff, prior to September 11, 1918, defendants Friend J. Austin and Lettie M. Austin brought suit in the Superior Court of Imperial County, California, in the case numbered 4517 against Imperial Water Company No. 5, alleging in their complaint that said certificate numbered 2303 was lost, and on about the date last mentioned the court entered judgment cancelling said certificate and ordering the issuance of a new certificate in the name of defendant Friend J. Austin; that until about January 1, 1920, plaintiff had no knowledge

whatsoever regarding said suit or judgment; that prior to obtaining said judgment of cancellation said defendants Friend J. Austin and Lettie M. Austin transferred ten shares of water stock, being a portion of the number represented by said certificate numbered 2303, to one H. B. Graeser, for which a certificate was issued by Imperial Water Company No. 5, the further details of said transaction being to plaintiff unknown; that on or about February 25, 1919, the certificate so issued to said Graeser, and the certerficate issued to said Friend J. Austin, pursuant to said judgment were cancelled and certificate numbered 3898 of Imperial Water Company No. 5 for one hundred thirty-four (134) shares was issued in lieu thereof to defendant John Doe, whose true name is Paul H. Marley, and said Marley now holds the same.

17. That the aforesaid judgments, orders, transfers, certificates, assignments and conveyances and each of them were made by the defendants and the other persons herein named and each of them with full knowledge of the rights of the plaintiff under the aforesaid deed of trust and mortgages, and with full knowledge that said judgment of registration was procured by fraud as aforesaid, and that all the other acts of defendants, and other persons herein named and each of them, were taken pursuant to said conspiracies as aforesaid, and for the purpose of cheating and defrauding plaintiff of its security, and said defendants Jasper Thomason, T. P. Banta, Jesse Boyd Pilcher and John W. Austin, and each of them, had no financial interest in any of the said transactions

herein mentioned, and acted in all matters herein mentioned only as intermediaries and go-betweens of the other defendants: that on or about May 14, 1917, the Delta Land & Water Company, by an instrument in writing, notified said defendant Friend J. Austin that his note for fifty-five thousand dollars ($55,000), as aforesaid, and the notes of Annie Marie Belford and Joseph Carrick for ten thousand dollars ($10,000) and twelve thousand dollars ($12,000) respectively, as aforesaid, had been transferred and assigned by said company to the N. and E. J. Allen Company, and by the latter company to the plaintiff, Frances Investment Company.

18. That in consideration of the transfers to them as aforesaid said Frances R. Wilson, A. M. Wilson, Bertha Edgar and W. C. Edgar paid to defendants H. F. Davis and Meryle T. Davis the sum of Seven thousand five hundred dollars ($7,500) in cash, which the said defendants converted to their own uses and purposes and have not paid the same or any part thereof to plaintiff.

That plaintiff is informed and believes and therefore alleges that the transfer to said defendants Wade N. Boyer and Leah A. Boyer as aforesaid, was without consideration and for the purpose of defrauding plaintiff and the other creditors of said defendants H. F. Davis and Meryle T. Davis.

That plaintiff has no information as to whether said transfers to said Aron and said Walker were made with or without consideration.

That in equity and good conscience plaintiff is entitled to the property standing in the names of said defendant T. P. Banta and said defendants Wade N. Boyer and Leah A. Boyer, as aforesaid, the mortgages standing in the names of said defendants John W. Austin and John Roe, whose true name is John W. Wolfe, as aforesaid, and is entitled to have said defendants and each of them account to it for all the moneys, funds and property, both real and personal that they, or any of them, may have or be entitled to as a result of any transaction or transactions connected with the property described in said deed of trust, and said mortgages assigned to said Delta Land & Water Company and said water stock certificates pledged, all as aforesaid, or as a result of any transaction or transactions in the fruits, conversions and reconversions of said property so mortgaged and pledged, or any of it, or of any mortgage or lien thereon.

19. That said defendants and each of them claim to have some right, title, interest or lien, in or upon the above described premises, or some part thereof, as purchasers, mortgagees, judgment creditors, or otherwise, but such right, title, interest, or lien if any they have, are each and all of them subsequent, subject and subordinate to the title, interest and lien of the trust deed and mortgages of plaintiff hereinabove mentioned and to the rights of the plaintiff thereunder, and also to the rights of the plaintiff in equity and good conscience as aforesaid.

WHEREFORE, plaintiff prays that it may have the relief prayed for in its original prayer in the original

bill of complaint herein, and that all of the defendants herein named, and all persons claiming under them subsequent to the execution of the aforesaid deed of trust and mortgages belonging to plaintiff, be barred and forever foreclosed of all rights, claims or equity of redemption on said property conveyed by said deed of trust, and said mortgages and every part thereof.

That defendants be required to surrender up the certificates of water stock, wrongfully acquired by reason of said delinquent sales as aforesaid, and said defendant Imperial Water Company No. 1; said Imperial Water Company # 3, and said Imperial Water Company No. 5, be required to recognize the aforesaid certificates of plaintiff.

That in the event said foreclosures and the return of said water stock cannot be had, that it be adjudged that the defendants and each of them account to the plaintiff for all the moneys, funds and property, both real and personal, that they or any of them may have, or be entitled to as a result of any transaction or transactions connected with the property originally mortgaged and pledged to the Delta Land & Water Company, as aforesaid, or as a result of any transaction, or transactions in the fruits, conversions or reconversions of said property so mortgaged and pledged, or any of it, or of any mortgage or lien thereon.

That defendants and each of them be enjoined, during the pendency of this suit from in any manner disturbing the present status to the above described property, and that a receiver be appointed and put in possession of the above described property during the pendency hereof.

That plaintiff may have such other and further relief in the premises as to this Court may seem meet and equitable.

And may it please your Honors to grant to this plaintiff a writ or writs of subpoena directed to the said defendants named in this amended supplemental bill of complaint who are not named in the original bill of complaint, and each of them issue out of and under the seal of this Honorable Court; thereby commanding them at a certain time and under a certain penalty, therein to be named, personally to be and appear before this Court, then and there civilly to make full and true answer to this amended supplemental bill of complaint not under oath (such answer under oath being hereby expressly waived) and to show cause, if any there be, why the prayer of the bill of complaint herein and of this amended supplemental bill of complaint should not be granted according to the rule and practice of this Court, and to stand, to perform and abide by such order, direction and decree as may be made against them in the premises, and as shall seem meet to equity and good conscience.

And your plaintiff, as in duty found, will ever pray, etc.

Wm Story Jr.
Joseph L. Lewinsohn
Solicitors for Plaintiff.

[Endorsed]: ORIGINAL No. Eq. D-61. United States District Court Southern District of California Southern Division FRANCES INVESTMENT

COMPANY, Plaintiff, vs. FRIEND J. AUSTIN, ET AL., Defendants. AMENDED SUPPLEMENTAL BILL IN EQUITY. Receipt of a copy of the within is hereby admitted this 31 day of March 1920 Joe Crail Duke Stone Atty for part of defts Edwin Gill Myra Gill Attorney....for...... FILED APR. 5, 1920 CHAS. N. WILLIAMS, Clerk By Maury Curtis Deputy WM. STORY, Jr. and JOSEPH L. LEWINSON Second and Hill Streets Los Angeles, Cal. Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, vs FRIEND J. AUSTIN, LETTIE M. AUSTIN, HIS WIFE, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, HIS WIFE, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS AND MERYLE T. DAVIS, HIS WIFE, JOHN W. AUSTIN AND LAURA A. AUSTIN, HIS WIFE, JASPER THOMASON, JESSE BOYD PILCHER, THOMAS EDWIN GILL AND MYRA RITZINGER GILL, HIS	IN EQUITY Eq. D-61-J NOTICE OF SPECIAL APPEARANCE AND OF MOTION TO QUASH SERVICE OF SUBPOENA, ETC.

WIFE, HARRY D. ARON,)
T. P. BANTA, ROBERT)
B. WALKER, JOHN DOE,)
RICHARD DOE JOHN)
ROE, RICHARD ROE,)
SARAH DOE, JANE DOE,)
SARAH ROE, JANE ROE,)
A-1 COMPANY, a corpora-)
tion, B-1 COMPANY, a cor-)
poration, C-1 COMPANY, a)
corporation, I M P E R I A L)
WATER COMPANY NO. 1,)
IMPERIAL WATER COM-)
PANY NO. 3, IMPERIAL)
WATER COMPANY NO. 5,)
WADE N. BOYER and)
LEAH A. BOYER, his wife,)
Defendants.)

TO THE PLAINTIFF IN THE ABOVE ENTITLED ACTION AND TO WILLIAM STORY, JR., ESQUIRE, AND JOSEPH L. LEWINSOHN, ESQUIRE, ATTORNEYS FOR SAID PLAINTIFF:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that the defendant Jasper Thomason has appeared specially and does hereby appear specially in the above entitled action through the undersigned, his solicitors, for the sole purpose of making the motion hereinafter mentioned; that the said Jasper Thomason has not appeared generally and does not appear generally in this action; and that the said defendant so appearing specially will, through the undersigned, his solicitors, move the above named Court before the Honorable WILLIAM P. JAMES, to whom this cause has been reassigned, at his court

room in the Federal Building, Los Angeles, California, on the 20th day of April, 1925, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order quashing service of subpoena upon the said defendant in the above entitled action, vacating and setting aside that certain order Pro Confesso made in the above entitled action on the 12th day of October, 1923, and vacating and setting aside as to the said defendant Thomason, that certain "Final Decree" entered in the said cause on the 24th day of March, 1925, all upon the ground that this court has not now and never has had jurisdiction over the person of the said defendant.

Said motion will be based upon this notice of motion, the said special appearance heretofore entered herein by the clerk of this court, the annexed affidavits of Jasper Thomason, Rosamond Mildred Hunt and Nellie M. Thomason, each of which was verified on the 7th day of April, 1925; the alias subpoena on amended supplemental bill of complaint herein, the returns of service of the said subpoena made herein by W. S. Walton and dated respectively, May 13, 1921, October 4, 1923 and October 5, 1923, being the only returns of service of subpoena upon the said defendant Thomason, and upon the said order Pro Confesso made and entered herein on the 12th day of October, 1923, and the said "Final Decree" made and entered herein on the 24th day of March, 1925, and upon all of the clerk's record and the papers and files in the above entitled proceeding which may have any relevancy to or bearing upon the said motion, and the said motion will be made upon the grounds that no subpoena in the

said cause was ever delivered to the defendant personally and that the only service or attempted service of subpoena herein was made by leaving a copy thereof with Rosamond Mildred Thomason on the 13th day of May, 1921, at a time when the said Rosamond Mildred Thomason was under the age of 18 years and was not an adult person, and that no service or attempted service of subpoena herein was made upon any other person or at any other time than upon the said Rosamond Mildred Thomason on said 13th day of May, 1921. That said defendant Jasper Thomason has not heretofore been served in the manner required by law with subpoena in this action nor has he voluntarily appeared herein nor has he waived due service of process upon him, and that the court is now and has been at all times without jurisdiction over the person of the said defendant Thomason, who has appeared and who appears herein solely and only for the purpose of making the said motion on the said ground of want of jurisdiction over his person.

Dated this 15th day of April, 1925.

WM. T. KENDRICK
NEWLIN & ASHBURN

Solicitors for said Defendant so appearing specially herein.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, vs. FRIEND J. AUSTIN. LETTIE M. AUSTIN, HIS WIFE, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, HIS WIFE, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS AND MERYLE T. DAVIS, HIS WIFE, JOHN W. AUSTIN AND LAURA A. AUSTIN, HIS WIFE, JASPER THOMASON, JESSE BOYD PILCHER, THOMAS EDWIN GILL AND MYRA RITZINGER GILL, HIS WIFE, HARRY D. ARON, T. P. BANTA, ROBERT B. WALKER, JOHN DOE, RICHARD ROE, SARAH DOE, JANE DOE, SARAH ROE, JANE ROE, A-1 COMPANY, a corporation, B-1 Company, a corporation, C-1 COMPANY, a corporation, IMPERIAL WATER COMPANY NO. 1, IMPERIAL WATER COMPANY NO. 3, IMPERIAL WATER COM-	IN EQUITY Eq. D-61-J AFFIDAVIT IN SUPPORT OF MOTION TO VACATE JUDGMENT.

PANY NO. 5, WADE N.)
BOYER and LEAH A.)
BOYER, his wife,)
Defendants.)

UNITED STATES OF AMERICA,)
)SS.
SOUTHERN DISTRICT OF CALIFORNIA)

JASPER THOMASON, being first duly sworn, deposes and says:

That he is the Jasper Thomason who is named as a party defendant in the above entitled action and against whom the court awarded, or purported to award, to plaintiff certain relief in that certain "Final Decree", which was entered in the above entitled action on the 24th day of March, 1925. That no order was made by the above entitled court specially appointing or authorizing any person other than the Marshal of the District, or his deputy, to make service of subpoena herein. That the said Marshal did not, nor did any of his deputies, on the 13th day of May, 1921, or at any other time, deliver to affiant a copy of any subpoena issued in the above entitled action, and particularly was no copy of the alias subpoena issued herein on the Amended Supplemental Bill of Complaint under date of May 9, 1921, ever delivered to affiant by the said Marshal or any of his said deputies, and affiant was not present at the time of delivery of copy of any subpoena to his daughter, Roasmond Mildred Thomason; that affiant has at no time appeared in person or through attorney or solicitor in this action and has not heretofore authorized any attorney or solicitor to appear for him herein. That on the said 13th day

of May, 1921, affiant had only four (4) daughters, and all of the said daughters had been married prior to the said date, except Rosamond Mildred Thomason, whose name now is Rosamond Mildred Hunt. That the said Rosamond Mildred Hunt is a daughter of affiant and Nellie M. Thomason, having been married to one Theodore G. Hunt subsequent to May 13, 1921. That on the said last mentioned date the said Roasmond Mildred Thomason was the only person who was a member of the family of affiant, or a resident in the said family, who was or could properly be known by the name of Miss Thomason. That the said Rosamond Mildred Thomason was born in the County of Los Angeles, State of California, on the 17th day of December, 1903, and not before. That there is attached hereto and made a part hereof with the same force and effect as if herein set forth in full, an abstract from the records of Births of the County of Los Angeles, California, which has been duly certified by the Deputy County Recorder of said county, and which is marked "Exhibit A". That the said Rosamond Mildred Thomason was not on the said 13th day of May, 1921, or at any time prior to the 17th day of December, 1921, an adult person.

This affidavit is made for the purpose of enabling affiant to make a special appearance in the above entitled action through Wm. T. Kendrick, Esq., and Newlin & Ashburn, Esqs., who are hereby designated as his solicitors, for the said purpose, which said special appearance shall be made for the sole purpose of moving this court to quash service of subpoena herein

and vacate and set aside the Order Pro Confesso made herein on October 12th, 1923, and to vacate and set aside as to this defendant the "Final Decree" entered herein on the 24th day of March, 1925, upon the ground that the said court has not and at no time has had jurisdiction over the person of this affiant.

WHEREFORE, affiant prays for leave to make such special appearance for said purpose through his solicitors herein, and prays that the said service of subpoena be quashed, the said Order Pro Confesso and said "Final Decree", and each of them, be vacated and set aside as to this defendant upon the said ground that this court has no jurisdiction and has not at any time had jurisdiction over the person of this defendant.

Jasper Thomason

Subscribed and sworn to before me this 7 day of April, 1925.

Charles A. Eagler

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Oct. 9, 1927
(Seal)

"EXHIBIT A"

CERTIFICATE OF BIRTH

County Recorder's Office, Los Angeles County, California

Date April 6, 1925.

Name of Father Jasper Thomason
Maiden name of Mother Nellie M. Harris

Name of Child Rosamond Mildred Thomason
Date of Birth Dec. 17, 1903
Race White Sex Female Condition at Birth Alive
Parentage American.

I CERTIFY that the above is a true abstract from the records of Births, Book 4 Page 342-3 of Los Angeles County, Cal.

C. L. Logan
County Recorder, Los Angeles County, Cal.
By B. M. Sanford,
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, vs. FRIEND J. AUSTIN, LETTIE M. AUSTIN, HIS WIFE, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, HIS WIFE, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS AND MERYLE T. DAVIS, HIS WIFE, JOHN W. AUSTIN AND LAURA A. AUSTIN, HIS WIFE, JASPER	IN EQUITY Eq. D-61-J AFFIDAVIT IN SUPPORT OF MOTION TO VACATE JUDGMENT

THOMASON, JESSE)
BOYD PILCHER,)
THOMAS EDWIN GILL)
AND MYRA RITZINGER)
GILL, HIS WIFE, HARRY)
D. ARON, T. P. BANTA,)
ROBERT B. WALKER,)
JOHN DOE, RICHARD)
DOE, JOHN ROE, RICH-)
ARD ROE, SARAH DOE,)
JANE DOE, SARAH ROE,)
JANE ROE, A-1 COM-)
PANY, a corporation, B-1)
COMPANY, a corporation,)
C-1 COMPANY, a corpora-)
tion, IMPERIAL WATER)
COMPANY NO. 1, IMPE-)
RIAL WATER COMPANY)
NO. 3, IMPERIAL WATER)
COMPANY NO. 5, WADE)
N. BOYER AND LEAH A.)
BOYER, HIS WIFE,)
Defendants.)

UNITED STATES OF AMERICA,)
)SS
SOUTHERN DISTRICT OF CALIFORNIA.)

ROSAMOND MILDRED HUNT, being first duly sworn, deposes and says:

That she is the daughter of Jasper Thomason, who is named as one of the defendants in the above entitled action. That her mother's name is Nellie M. Thomason. That affiant was subsequent to May 13th, 1921, married to Theodore G. Hunt. That affiant's maiden name was Rosamond Mildred Thomason, and said last mentioned name was her name on the 13th day of May, 1921. That affiant's father and mother had at said time four (4) daughters, and no more. That on said date all of the said daughters, except

affiant, had been married, and affiant was the only daughter or the only person who was then a member of her father's family, or a resident in the said family, who was known as Miss Thomason, or who could properly be known as Miss Thomason. That on the said 13th day of May, 1921, one W. S. Walton, who, as affiant is informed and believes, was at that time Deputy United States Marshal for the Southern District of California, delivered to her a copy of the Alias Subpoena upon Amended Supplemental Bill of Complaint in the above entitled action, and that the said copy of subpoena was not, nor was any copy thereof so far as affiant knows, delivered by the said Walton to her father, Jasper Thomason. That the said Jasper Thomason was not present at the time of the delivery of the said copy of subpoena to affiant, and no other copy of subpoena in the said action was on said day or at any other time ever delivered to affiant. That affiant was born on December 17th, 1903, and not before, and was not on the said 13th day of May, 1921, an adult person.

Rosamond Mildred Hunt

Subscribed and sworn to before me
this 7″ day of April, 1925.

Charles E. Eagler

Notary Public in and for the County of Los Angeles,
State of California.

My commission Expires Oct. 9, 1927.

(Seal)

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT)
COMPANY,)
a corporation,)
Plaintiff,)
vs.)
FRIEND J. AUSTIN, LET-)
TIE M. AUSTIN, HIS)
WIFE, WILLIAM MAR-)
TIN BELFORD, ANNIE)
MARIE BELFORD, HIS)
WIFE, THE PEOPLES)
ABSTRACT & TITLE)
COMPANY, a corporation,)
H. F. DAVIS AND)
MERYLE T. DAVIS, HIS)
WIFE? JOHN W. AUSTIN,)
AND LAURA A. AUSTIN,)
HIS WIFE, JASPER) IN EQUITY
THOMASON, JESSE)
BOYD PILCHER, THOM-) EQ. D-61-J
AS EDWIN GILL AND)
MYRA RITZINGER GILL,) AFFIDAVIT IN
HIS WIFE, HARRY D.) SUPPORT OF
ARON, T. P. BANTA, ROB-) MOTION TO
ERT B. WALKER, JOHN) VACATE
DOE, RICHARD DOE,) JUDGMENT.
JOHN ROE, RICHARD)
ROE, SARAH DOE, JANE)
DOE, SARAH ROE, JANE)
ROE, A-1 COMPANY, a cor-)
poration, B-1 COMPANY, a)
corporation, C-1 COMPANY,)
a corporation, IMPERIAL)
WATER COMPANY NO. 1,)
IMPERIAL WATER COM-)
PANY NO. 3, IMPERIAL)

WATER COMPANY, NO.)
5, WADE N. BOYER AND)
LEAH A. BOYER, HIS)
WIFE,)
Defendants.)

UNITED STATES OF AMERICA)
) SS
SOUTHERN DISTRICT OF CALIFORNIA,)

NELLIE M. THOMASON, being first duly sworn, deposes and says:

That she is and at all times hereinafter mentioned has been the wife of Jasper Thomason, who is named as one of the defendants in the above entitled action. That affiant and Jasper Thomason have, and on May 13th, 1921, had, four (4) daughters, and no more. That one of the daughters is now named Rosamond Mildred Hunt. That her maiden name was Rosamond Mildred Thomason. That all of the daughters of the said Jasper Thomason and of affiant, except the said Rosamond Mildred Thomason, were married prior to May 13th, 1921, and none of them except the said Rosamond Mildred Thomason was known as Miss Thomason, and none of them could properly be known as Miss Thomason on said date except the said Rosamond Mildred Thomason. That said Rosamond Mildred Thomason was born in the County of Los Angeles, California, on December 17th, 1903, and not prior to said date, and the said Rosamond Mildred Thomason was not on May 13th, 1921, an adult person, and there was not on said date any other person who was a member of the family of the said Jasper Thomason, or a resident in the said family, who was

known or could properly be known as Miss Thomason, except the said Rosamond Mildred Thomason.

Nellie M. Thomason

Subscribed and sworn to before me this 7 day of April, 1925.

Charles E. Eagler

Notary public in and for the County of Los Angeles, State of California.

My Commission Expires Oct. 9, 1927

(Seal.)

[Endorsed]: IN EQUITY No. Eq. D-61-J In the UNITED STATES DISTRICT COURT, In And For The SOUTHERN DISTRICT OF CALIFORNIA, Southern Division FRANCES INVESTMENT COMPANY, a corporation, Plaintiff vs. FRIEND J. AUSTIN, et al., Defendants Affidavits and NOTICE OF SPECIAL APPEARANCE AND OF MOTION TO QUASH SERVICE OF SUBPOENA, ETC. Received copy of the within affidavits and notice this 15th day of April 1925 Lewinson & Barnhill Attorneys for Plaintiff FILED APR 15 1925 CHAS N WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk Wm. T. Kendrick & NEWLIN & ASHBURN 935 Title Insurance Building Telephone Main 0159 Los Angeles, Cal. Attorneys for Defendant Jasper Thomason, Appearing Specially

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

<table>
<tr><td>FRANCES INVESTMENT COMPANY,
a corporation,

Plaintiff,

vs.

FRIEND J. AUSTIN, et al.,

Defendants.</td><td>IN EQUITY
Eq. D-61-J
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SERVICE OF SUBPOENA, ETC.</td></tr>
</table>

POINT 1.

The court did not acquire jurisdiction over the person of defendant Thomason.

Federal Equity-Rules 13 and 15;

California Civil Code, Sections 25, 26 and 27;

1 Street's Federal Equity Practice, Sec. 595;

Blythe vs. Hinckley, 84 Fed. 228;

Gage vs Riverside Trust Co., 156 Fed. 1002;

34 Corpus Juris, page 899; sec. 310;

Rose's Code of Federal Procedure, Sec. 970, page 927.

Special appearance and motion to quash is proper method of raising question of jurisdiction over person.

1 Street's Federal Equity Practice, Sections 650, 665, and 662;

Simkins Federal Practice, page 599;

S. P. Co. vs. Arlington Heights Fruit Co., 191 Fed. 101;

Wall vs C. & O. Ry. Co., 95 Fed. 398, 401;
Peper Auto Co. vs. American Motor Etc. Co., 180 Fed. 245;
1 Foster's Federal Practice, Section 167a.

Respectfully submitted,
Wm. T. KENDRICK
NEWLIN & ASHBURN
Solicitors for defendant Jasper Thomason appearing specially herein.

Service admitted 15th of April 1925
Lewinson & Barnhill
Attys for plff.

Filed Apr 15 1925 Chas N Williams By Edmund L Smith

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FRANCES INVESTMENT COMPANY, a corporation,
Plaintiff,
vs.
FRIEND J. AUSTIN, et al,
Defendants.

No. D-61-J Equity.

AFFIDAVIT.

UNITED STATES OF AMERICA)
) ss
SOUTHERN DISTRICT OF CALIFORNIA.)

A. W. ASHBURN, being first duly sworn, deposes and says:

That he is one of the solicitors for the defendant Jasper Thomason, appearing specially herein; that the said defendant's motion to quash service of subpoena, etc., was originally noticed for a hearing on April 20th, 1925; that on or about the 17th day of April, 1925, Mr. Joseph L. Lewinsohn, one of the solicitors for the plaintiff, telephoned deponent and explained that he had been so busy with other matters that he had not prepared, and would not have an opportunity to prepare, the matter of the said motion so that he could present the same on the 20th of April, but that he could and would be prepared to present the same on the 27th of April, if deponent would consent to a continuation of said motion; that deponent, after conferring with his associate counsel, informed the said Lewinsohn that he would consent to the said continuation, and deponent was assured by the said Lewinsohn that he would be ready to go ahead on April 27th, and said cause was thereupon continued to said last mentioned date; that on Thursday, April 23rd, the said Lewinsohn again telephoned deponent and stated that he had discovered that he had an action set for trial before a jury in the Superior Court of Los Angeles County on Monday, April 27th; that it would be impossible for him to take care of said motion on said date; that he would like to have the matter continued for one week, but he would also be willing to endeavor to have the same set for hearing on the morning of Saturday, April 25th; that deponent, after conferring with associate counsel, telephoned said Lewinsohn that he did not feel justified in agreeing to a

continuation of said hearing for one week after April 27th, but would be willing to have the matter set for hearing on Saturday, April 25th. Whereupon, said Lewinsohn stated that he could not do that because he would be unable to prepare the matter by that date, but if deponent was unable to agree to a continuance he would have some person present on Monday, April 27th, to present the matter as best he could and to ask leave to submit authorities in opposition to the motion; that nothing further was heard from said Lewinsohn until Saturday, April 25th, when deponent was served with affidavit and notice of motion for continuance. Deponent had an action set for trial in the Superior Court of Los Angeles County on Friday, April 24th, which said action was ready for trial but could not be reached by the court; that deponent explained to the court that he had the above entitled matter set for hearing on Monday, April 27th, and the court, for the purpose of enabling deponent to take care of the said matter, continued the said action until Tuesday, April 28th, instead of Monday, April 27th.

Further affiant saith not.

A. W. Ashburn

Subscribed and sworn to before me this 27th day of April, 1925.

(Seal) ....

Notary Public in and for the County of Los Angeles, State of California.

Chas. N Williams, Clerk U. S. District Court Southern District of California by R. S. Zimmerman, Deputy.

[Endorsed]: No. D-61-J (Equity) IN THE United States District Court IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION FRANCES INVESTMENT COMPANY, a corporation, Plaintiff vs. FRIEND J. AUSTIN, et al, Defendants AFFIDAVIT. Received copy of the within Affdt this 27 day of April 1925 Joseph L. Lewinson and Wm Story Jr, Attorney for .... FILED APR 27 1925 CHAS N WILLIAMS Clerk By L. J. Cordes Deputy Clerk W. T. KENDRICKS, and NEWLIN & ASHBURN 935 Title Insurance Building Telephone Main 0159 Los Angeles, Cal. Attorneys for deft. Jasper Thomason, Appearing Specially.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, vs FRIEND J. AUSTIN, et al., Defendants.	IN EQUITY. Eq. D-61-J. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO QUASH SERVICE OF SUBPOENA, ETC.

Plaintiff respectfully submits the following points and authorities in opposition to the motion of defendant, Jasper Thomason, for an order quashing service of subpoena upon said defendant and vacating and set-

ting aside the order Pro Confesso made on October 12, 1923, and vacating and setting aside as to said defendant the Final Decree entered on March 24, 1925:

The grounds of defendant's motion are stated to be:

> "that no subpoena in the said cause was ever delivered to the defendant personally and that the only service or attempted service of subpoena herein was made by leaving a copy thereof with Rosamond Mildred Thomason on the 13th day of May, 1921, at a time when the said Rosamond Mildred Thomason was under the age of 18 years and was not an adult person, and that no service or attempted service of subpoena herein was made upon any other person or at any other time than upon the said Rosamond Mildred Thomason on said 13th day of May, 1921. That said defendant Jasper Thomason has not heretofore been served in the manner required by law with subpoena in this action nor has he voluntarily appeared herein nor has he waived due service of process upon him, and that the court is now and has been at all times without jurisdiction over the person of the said defendant Thomason. * * *"

It is well settled that a motion of this character must definitely point out the defects in the service, and nothing beyond the scope of the motion will be considered.

Bankers' Surety Co. v. Town of Holly, 219 Fed. 96
Any argument upon the motion is therefore limited to the grounds stated in the notice of motion.

I.

THE AMENDED RETURN OF THE MARSHAL*L* IS CONCLUSIVE UPON THIS DEFENDANT.

The Amended Return of the Marshal*l* made (upon leave of the Court) on October 4, 1923 is as follows:

Amended Return	UNITED STATES
Frances Investment Co.	. MARSHAL'S OFFICE
vs.	D.61
Friend J. Austin et al	SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify and return, that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason, an adult person, who is a member or resident in the family of Jasper Thomason, said defendant named herein, at the County of Los Angeles, in said district, an attested copy thereof, at the dwelling house or usual place of adode of said Jasper Thomason, one of the said defendants herein.

C. T. WALTON
U. S. MARSHALL
By W. S. WALTON
DEPUTY

LOS ANGELES, CALIFORNIA
October 4, 1923.

This return complies in all respects with Federal Equity Rule 13, which is as follows:

> "The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family."

The return of the Marshall is, moreover, complete and self-supporting. Under these circumstances the return is conclusive upon this defendant. The following authorities are directly in point.

> Joseph v. New Albany Steam Mill Co., 53 Fed. 180

This was a suit to foreclose a pledge of choses in action and for other equitable relief. A subpoena in chancery was issued to the marshal, upon which he made a return to the effect that he had served the same upon one, John Marsh, agent of the defendant in custody of its property and in charge of its office. (A copy of the return is set forth in the opinion.) The defendant moved to quash this return on the ground that said Marsh was not its agent or in its employ at the time the writ was served. This motion was overruled. The Court (Circuit Court for the District of Indiana) says in the course of its opinion:

> "Whatever may be the rule in other states in regard to the effect of the return of an officer in executing mesne or final process, I think it is the settled law in this state that the return of a sheriff showing that he has served the writ in the manner prescribed by the statute, for the purpose of giving the court jurisdiction, is conclusive against a col-

lateral attack. Smith v. Noe, 30 Ind. 117; Rowell v. Klein, 44 Ind. 290; Splahn v. Gillespie, 48 Ind. 397; Johnson v. Patterson, 59 Ind. 237; Stockton v. Stockton, Id. 574; Hite v. Fisher, 76 Ind. 231; Hume v. Conduitt, Id. 598; Birch v. Frantz, 77 Ind. 199; Johnson, etc., Co. v. Bartley, 81 Ind. 406; Coan v. Clow, 83 Ind. 417; Krug v. Davis, 85 Ind. 309; Nichols v. Nichols, 96 Ind. 433; Nietert v. Trentman, 104 Ind. 390, 4 N. E. Rep. 306. It is argued that while the return may be conclusive for the purpose of conferring jurisdiction, where the facts stated in the return are within the personal knowledge of the officer, it ought not to have such conclusive effect where the facts stated in such return presumably rest upon information derived from others. In my opinion, where the facts stated in the return are such as the law requires the officer to ascertain and return under his oath of office, the manner in which he has ascertained the facts is immaterial. In every instance of the personal service of process, the officer must determine that the person served is the identical person named in his writ. So, where service is made by copy left at the defendant's last and usual place of residence, the officer must determine the identity of the party, and that the place where the copy is left is the last and usual place of residence of such party. The law has imposed the duty of ascertaining these facts upon the sheriff, and whether he finds and returns the facts from personal knowledge, or otherwise it makes no difference in the rule of law.

Splahn v. Gillespie, 48 Ind. 397; Hite v. Fisher, 76 Ind. 231. If it were open to a party to contradict the sheriff's return collaterally, in every case where the facts returned by him did not lie within his personal knowledge, it would open the door to endless conflict and confusion. The law in this state is firmly settled that the facts which the sheriff is required by law to ascertain and return in obedience to his writ, when so ascertained and returned by him, cannot be impeached collaterally, by a resident of the state, for the purpose of quashing the service and return and ousting the court of jurisdiction, by showing that the facts exhibited in the return are untrue."

Von Roy v. Blackman, Fed. Cas. No. 16,997.

This was a suit in equity in which defendant by plea in abatement objected to the sufficiency and legality of the service of process upon her. The Court (Circuit Court, District of Louisiana) in declaring the plea bad, says:

"The authorities are numerous and weighty in support of the proposition, that in the same case the parties cannot question the return of the officer: Benn & H. Dig. tit. 'Officer,' subd. 5; Id. 'Return of Officers'; Lawrence v. Pond, 17 Mass. 432; Com. Dig. tit. 'Return,' F, 2; Barr v. Satchwell, 2 Strange, 813; 2 Phil. Ev. (Ed. 1859, Cowan & Hill's Notes) 370; 3 Bouv. Inst. 190, 2795; Cow. Treat, 335 art. 867; Goubot v. De Crouy, 1 Cromp & M 773; Putnam v. Man, 3 Wend. 202; Case v. Redfield, 7 Wend. 399; Evans v. Parker,

20 Wend 622. I have endeavored to find cases which would support the proposition urged by the defendant, that where a fact involving an opinion was returned by the sheriff, there might be an exception to the rule that the return could not be denied. But the principle seems to be settled, that as to parties and privies, the return of the sheriff, as to any fact which he was bound to return, is conclusive. In Lawrence v. Pond, supra, the return was as to the qualifications of the appraisers of land taken on exception. In Goubot v. De Crouy, 1 Cromp. & M. 772, the return was 'that the defendant was and yet is in the service of the Sicilian minister at the British court as a domestic servant.' Busby moved to set aside the return on strong affidavits, showing fraud and collusion between the sheriff's officer and the defendant; that the defendant was in trade; that he had said he was endeavoring to get attached to the embassy; that he had been taken and collusively discharged by the officer. The court says: 'We cannot interfere upon motion, your only course is by bringing an action against the sheriff for false return.' In Case v. Redfield, supra, evidence was offered that a copy of the attachment was not left at the dwelling-house, or last place of abode of the defendant and it was excluded. In the case of Van Rensselaer v. Chadwick, 7 How. Prac. 297, the court seems to hold that the return of the sheriff is not conclusive, and may be contradicted. This would be in opposition to the

other cases which I find, and they are so numerous that I have no doubt upon the subject. In the case of Earle v. McVeigh, 91 U. S. 503, I am satisfied that the decision, so far as it involves the question here presented, was based upon the ground that the impeachment of the return was in a second suit. The plea is therefore bad, since it traverses the return of the marshal in the same cause in which it is made."

Trimble v. Erie Electric Motor Co., 89 Fed. 51, accord.

The rule thus laid down to the effect that the return of the marshal is, in a case of this character, conclusive upon the defendant, is subject to qualifications. A number of cases holding to the contrary are to be distinguished upon one of the following grounds: (1) Either the return of the marshal was not itself complete and self-supporting upon its face, or (2) the defendant was not in fact actually within the jurisdiction of the Court at the time of the attempted service. But in the case at bar neither of these circumstances existed. As already pointed out the amended return of the marshal was entirely complete and self-supporting upon its face. Moreover, at the time of the service of the subpoena (May 13, 1921), defendant, Thomason, was in fact within the territorial jurisdiction of this Court.

The affidavit of Meryle Thomason Davis, daughter of Jasper Thomason, filed herein in opposition to the motion of plaintiff for a continuance of the hearing of this defendant's motion to quash affirms that on Janu-

ary 23, 1920, this defendant resided at No. 336 East Orange Grove Avenue, Pasadena, California, and continued to reside at that place until on or about September 1, 1920, when he changed his residence to No. 1743 Eighth Street, Santa Monica, California, where he resided until on or about November 1, 1921; "that during all the time aforesaid * * * said Thomason was continuously at his said residences respectively and could have been served with process during any of said time."

That decisions holding that the return of the marshal is not conclusive are to be distinguished upon these grounds is apparent from an examination of decisions touching this point. In Joseph v. New Albany Steam Mill Co. (cited above) the Court takes occasion to point out:

> "If the facts were falsely returned by the officer, knowingly or corruptly, with the privity or consent of the plaintiff, or if the plaintiff was a nonresident of the state, a different rule of law might apply; * * *
>
> (Italics ours.)

So also in Nickerson v. Warren City Tank Co., 223 Fed. 843, which arose upon a motion to set aside service of process, the Court (District Court, Eastern District of Pennsylvania) in the course of its opinion, says:

> "Two facts are essential to a good service of process. One is the actual or constructive presence of the defendant within the jurisdiction. The other is a service made in the legal mode or manner prescribed.

* * * * * * * *

The basis of a return of service thus being a fact or facts, there is in every question of its sufficiency the accompanying query of how the facts are to be determined and by whom they are to be found. Take the case of a defendant returned as served and without other complicating circumstances. The one fact here is the simple one of whether it was the defendant who was served, or whether he was in fact served. Necessarily, in the first instance, at least, the marshal or other officer must determine the fact. This finding he makes in his return. Necessarily, again, the fact at least prima facie, must be as returned. If the fact be challenged, and the real defendant denies he was served, we come to the intermediate query of how the question of fact can be raised or the remedy at the command of a defendant so circumstanced. One remedy which suggests itself is an action against the marshal for a false return. Another is a plea in abatement. Still another, at least possible one, is a motion to quash the return or to set aside the service. Out of the choice of possible remedies arises this preliminary question. The earlier cases in Pennsylvania laid down the doctrine that the return of the sheriff could not be questioned, but for the purpose of bringing the defendant into court was conclusive, and, as it must be accepted as verity, the defendant was remitted to his plea in abatement or his action for a false return. This rule has, however,

latterly been somewhat relaxed, and the principle has been modified, at least to the extent that where the return of the sheriff is not in itself complete, in the sense of not being wholly self-supporting, there a motion would be entertained, and the facts inquired into and determined by the court. This modification implied the converse, that when the return is complete and self-supporting the old rule still pertains. The rulings have nevertheless shown a drift, and the courts avow it in the direction of permitting an inquiry into the real facts, and allowing the return to stand or setting it aside in accordance with the facts as found by the court. Park Bros. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334; Fulton v. Association, 172 Pa. 117, 33 Atl. 324; Hagerman v. Empire Slate Co., 97 Pa. 534.

This is the attitude of the courts of the United States. The fact of the presence of the defendant within the jurisdiction they determine for themselves, and in determining it they may or may not follow the rulings of the state courts."

(Italics ours.)

It is therefore respectfully submitted that in this proceeding defendant, Thomason, may not contradict the return of the marshal to the effect that an attested copy of the subpoena was left with an adult person, who was a member or resident in the family of Jasper Thomason, at the dwelling house or usual place of abode of said Jasper Thomason.

II.

THIS DEFENDANT'S CONTENTION THAT THE COPY OF THE SUBPOENA WAS NOT LEFT WITH AN ADULT PERSON CANNOT BE ACCEPTED.

Assuming, without conceding, that the return of the marshal is not conclusive upon this defendant, nevertheless it cannot be said that the copy of the subpoena was not left with an adult person.

From the Affidavit of Jasper Thomason it appears that at the time the copy of the subpoena was left with Rosamond Mildred Thomason (now Rosamond Mildred Hunt) i. e. on May 13, 1921, this Rosamond Mildred Hunt was over 17 years and 4 months old. She was not, it is true, of full age as defined by the laws of California. It does not follow, however, that she was not an "adult person" as that term is used in Federal Equity Rule 13.

No case in the Federal courts has been found defining this term as used in the rule. There are, however, decisions which indicate the purpose of the rule and illustrate the liberality with which it must be applied.

Phoenix Ins. Co. v. Wulf, 1 Fed. 775

This was a suit in equity in which a copy of the subpoena had been left with defendant's husband in a grocery store on the ground floor of the building upon the second floor of which defendant resided. The Court (Circuit Court, District of Indiana) declared that this was proper service of process under Rule 13. The Court in the course of its opinion says:

> "A copy was left with one who understood its contents, and was likely to deliver it to the person for whom it was intended. * * * Rule 13 *must receive a reasonable construction* * * * The Rule is satisfied by a service outside the dwelling-house, at the door, just as much as inside the house."
>
> (Italics ours.)

In re Risteen, 122 Fed 732

This arose upon a plea in abatement wherein it was contended that the service of an involuntary petition in bankruptcy was insufficient. Section 18a of the Bankruptcy Act of 1898 provided that service of the petition with a writ of subpoena should be made in the same manner in which service of such process is now had upon the commencement of a suit in equity in United States courts. In other words, the Bankruptcy Act required process to be served in accordance with Federal Equity Rule 13. The petition in this matter was against the properietor and manager of a hotel. The copy of the writ was left with the clerk of the hotel at a time when the man against whom the petition was filed was actually in another city. The Court (District Court, District of Massachusetts) held that Rule 13 had been complied with.

Two things are established by these cases: (1) that Rule 13 must be given a reasonable construction; and (2) that the purpose of Rule 13 is to insure that the copy of the subpoena be left with one who may understand its contents and is likely to deliver it to the person for whom it is intended. In the light of this

purpose it would certainly be an unreasonable construction of the Rule to give to the term "some adult person" the narrow meaning which this defendant attempts to give it. This term appears to have been incorporated in the Federal Equity Rules in this connection in 1866. Prior to that time the term "some free white person" was used in the same connection. It cannot therefore be properly contended that the word "adult" as used in these rules is to be given the meaning which the Civil Code of California gives to this word. Moreover, it is not fair to assume that "adult person" as used in this Rule means "person of lawful age" since if this is the proper construction the Marshal must at his peril be assured, not only that the person to whom he delivers the subpoena is of such maturity of age that it is reasonable to suppose that such person will understand the contents of the subpoena and be likely to deliver it to the defendant, but that the person in question has as a matter of fact (regardless of appearance) attained majority. The case at bar aptly illustrates the injustice which must necessarily result from any narrow construction of this term as used in the Rule.

III.

EVEN ASSUMING THAT FEDERAL EQUITY RULE 13 WAS NOT COMPLIED WITH, THIS DEFECT CANNOT BE URGED BY THIS DEFENDANT.

It is significant that none of the affidavits filed by defendant, Thomason, in support of this motion state

that he himself did not in fact receive the copy of the subpoena left with his daughter. Assuming, without conceding, that his daughter was not an "adult person" within the meaning of Rule 13, nevertheless defendant must as a basis for urging the granting of this motion show substantial injury. He cannot show this save by showing that he did not until shortly before the notice of this motion have actual knowledge of this suit against him. If he had such knowledge, surely he should not be now permitted to urge that the service of the subpoena be quashed and that the decree against him be set aside. Having with knowledge of the pendency of the suit gambled upon an outcome favorable to himself, he should not be now permitted to overthrow the decree against him. It affirmatively appears (as indicated above) that at the time of the service of the subpoena he was actually residing within the territorial jurisdiction of this Court. He does not show affirmatively (and in the face of the marshal's return the burden was certainly upon him to do this) that he did not actually receive the copy of the subpoena from his daughter. He does not show affirmatively that he did not at all times have actual knowledge of the pendency of the suit and the proceedings therein which he now attacks. His own affidavit declares that neither the marshal nor any of his deputies ever delivered the copy of the subpoena to him; that he was not present at the time the copy was delivered to his daughter; and that he has never himself appeared, either in person or by attorney. Here he stops. His daughter's affidavit declares that so far as she

knows no copy of the subpoena was delivered to him by the deputy marshal; that he was not present at the time of the delivery of the copy of the subpoena to her, and that "no other copy of subpoena" in the action was ever delivered to him.

Over against this the Court's attention is respectfully invited to the averments of the affidavit of Joseph L. Lewinson, filed in opposition to this motion: That the Court found that this defendant was guilty of the gravest frauds charged against him in the amended supplemental complaint; that one H. F. Davis, a son-in-law of this defendant, and Meryle Thomason Davis, a daughter of this defendant, participated in these frauds; that said Davis was a defendant in said cause and also an attorney for numerous other defendants; that Meryle Thomason Davis was herself a witness; that when asked on the witness stand if she knew where her father (this defendant) was she said that she had talked to him the week before, but that he was somewhere in Kern County at a location which no one knew; that despite plaintiff's efforts, not only through the United States Marshal, but also through a firm of private detectives, plaintiff was unable to serve a subpoena upon this defendant.

The burden is upon this defendant to show that this motion is prosecuted in good faith. He is attacking a record which, upon its face, is faultless. If he knew of the proceedings being taken against himself it was his duty to have taken prompt action. It is for him to show that he had no such knowledge and this he has failed to do. The fair inference from all the facts now before the Court is that he had such knowledge.

Here, it is respectfully submitted, is a clear case for the application of Federal Equity Rule 19:

> "* * * The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

It is respectfully submitted that the motion for an order quashing service of the subpoena and vacating and setting aside the order Pro Confesso and the Final Decree against defendant, Jasper Thomason, should be denied.

Wm Story, Jr.
Joseph L. Lewinson
Solicitors for Plaintiff

McComb & Hall
Of Counsel

[Endorsed]: No Eq. D-61-J Dept............ In the DISTRICT COURT of the United States, Southern District of California, ...Division. FRANCES INVESTMENT COMPANY, a corporaton Plaintiff. vs. FRIEND J. AUSTIN, et al., Defendants. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO QUASH SERVICE OF SUBPOENA, ETC. FILED APR 29, 1925 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk Received copy of the within Memorandum this 29 day of April 1925 Newlin & Ashburn Wm C Kendrick Attorneys for Jasper Thomason WILLIAM STORY JR., and JOSEPH LEWINSON McCOMB & HALL Attorneys at Law 1014-15-16 Bank of Italy Bldg. Seventh and Olive Streets Los

Angeles, Calif. Phone 821459 215 West Seventh Street Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	IN EQUITY
	Eq. D-61-J
vs	REPLY BRIEF ON MOTION TO QUASH
FRIEND J. AUSTIN, et al., Defendants.	

ERRATA

Two errors occur in our opening memorandum. Section 655 of 1 Street's Federal Equity Practice was erroneously cited as 665, and 34 Corpus Juris, page 899, Section 1310, was erroneously cited as Section 310.

PRELIMINARY OBSERVATIONS.

Counsel for plaintiff have served with their brief herein a new and additional affidavit of Mr. Lewinson, to the consideration of which affidavit we object upon the ground that no leave to file or present the same was given, but that on the contrary the matter was submitted upon the papers on file on Monday last.

We have prepared and are submitting herewith an additional affidavit of Meryle Thomason Davis, which

affidavit we desire considered in the event that the court should deem it proper to take Mr. Lewinson's affidavit in consideration. From an examination of the Davis affidavit it will appear clearly that Mr. Lewinson has set forth the substance of only a part of the testimony of Mrs. Davis on the subject of her sister's age and such a part as leaves an erroneous impression in the mind of the court as to what she actually did say. It will also be observed from the proceedings at the trial as set forth in this new affidavit of Mrs. Davis that, on the 4th day of October, 1923, the date mentioned by Mr. Lewinson in his new affidavit, Mr. C. T. Walton had ceased to be United States Marshal and Mr. W. S. Walton had not only ceased to be a deputy marshal but was not within the jurisdiction. How counsel managed to procure the making and filing of such an amended return on that day by a man without the jurisdiction is for him to explain. We do not understand it. Not only does his own statement at the trial show that C. T. Walton and W. S. Walton had on that day ceased to be officers of the court, but this is a matter of which the court will take judicial notice and the briefest inquiry will disclose that in fact when the amended return was made the parties signing or purporting to sign the same had no official relation to the government, and, although they purported to act as officials, that was an unwarranted assumption of authority, and the return being at that time made by a private individual has no more efficacy than a return made by any other private citizen. The affidavit of W. S. Walton, verified October 5, 1923,

which is likewise attached to the subpoena, shows by fair inference that he had at that time ceased to be a deputy marshal.

If Mr. Lewinson's affidavit is considered we also ask the court to consider in opposition thereto the affidavits submitted by us in opposition to motion for continuance.

RETURN OF MARSHAL NOT CONCLUSIVE.

Even if it should be conceded that at the time the amended return was made (and, of course, the original return wholly fails to comply with equity rule XIII) Mr. W. S. Walton was still deputy United States Marshal, nevertheless that return is, under the large preponderance of authority, subject to impeachment upon a motion such as this.

Counsel have insisted so vigorously upon the impeccable nature of the amended return that we feel warranted in pointing out to the court the fact that the return is of itself of debatable sufficiency. The case of Nickerson vs. Warren City Stc. Co., 223 Fed. at 845 (cited by plaintiff) says:

> "Whenever the question of service is raised in determining the validity of a judgment obtained by default and without notice in fact to the defendant, and because of this without opportunity to present the defense, the record may properly be closely scrutinized to see that there was valid service."

Equity Rule XIII provides for alternative methods of substituted service, i. e., the leaving of a copy at

the dwelling house or usual place of abode and with an adult who is a member of or resident in the family. The amended return at bar is equivocal in that it does not show whether the service was made at the dwelling house or at the usual place of abode (which expressions are not necessarily synonymous) nor does it show that Miss Thomason was a member of defendant's family or a resident in his family. The return adopts the disjunctive and thus leaves it open to question as to whether the rule had in fact been complied with. In other words, the marshal has made a "shot gun" return seeking by generalities to come within the purview of the rule without purporting to confine himself to the exact fact. Moreover, the amended return does not say that Miss Thomason is or was an adult person,—it merely states that service was made on "Miss Thomason an adult person." The phrase "an adult person" being a mere recital as distinguished from a sworn allegation.

Be that as it may, the return, assuming it to be in all respects complete and regular on its face, is nevertheless subject, on a motion of this kind made by the defendant against whom default judgment has been entered, to impeachment.

Foster's Federal Practice, Section 167a, says:

> "If the marshal or his deputy make the service, his unverified return is sufficient. This may be contradicted, although there is a remedy by an action against the officer for a false return. The marshal's return, that the corporation served was transacting business within the district, can be

> contradicted; so can his return that the person on whom the service was made was authorized to represent the defendant for that purpose."

The leading case in this jurisdiction (cited in our opening memorandum but singularly ignored in plaintiff's brief) is Blythe vs Hinckley, 84 Fed. 228, decided by Judge Morrow sitting in Circuit Court. The discussion of the point here involved begins on page 239. The return showed service on Florence Blythe Hinckley "by delivering to and leaving with Mrs. Harry Hinckley, an adult person, who is a resident in the place of abode of Florence Blythe Hinckley, said defendant named herein, at the County of Alameda in said district, an attested copy thereof, at usual place of abode of said Florence Blythe Hinckley, one of the defendants herein." Judge Morrow said:

> "It will be observed that the return does not show that Mrs. Harry Hinckley, to whom a copy of the subpoena was delivered, was a member or resident of the family of Florence Blythe Hinckley; and it is contended that this departure from the requirement of the rule is fatal to the service, and therefore renders the decree absolutely void. It appears that Mrs. Harry Hinckley is the wife of the brother of the deceased husband of the defendant Florence. The difference between leaving a copy of a subpoena at the dwelling house or usual place of abode of the defendant with some adult person who is a member or resident of the family of the defendant, and leaving it

with a person who is a resident of the place of the abode of the defendant, is certainly very great, and might be very important. Take the case of a defendant living at one of our large hotels. A service such as is required by the rule would secure the delivery of the writ to some person so related to or associated with the person to be served that the substituted service would practically be the equivalent of an actual personal service by the officer; but a service such as was made in this case might be made by the delivery of the writ to an entire stranger, or to some indifferent or ignorant servant residing in the hotel, with no probability whatever that it would reach the party for whom it was intended. White v. Primm, 36 Ill. 418. Clearly, the rule is not complied with by any such service. Harris v. Hardeman, 14 How. 334. But it is said that the return of the marshal is that he has made personal service of the subjoena on Florence Blythe Hinckley, and that, as there is nothing in his certificate as to the method of making the service inconsistent with this return, a good and sufficient service will be presumed. It is also further contended that, if the return is defective in this respect, the defect has been cured by the recital in the decree that the subpoena "had been duly and regularly served within the Northern district of California upon the respondent in said cross bill of complaint." The doctrine here invoked to support the decree would be applicable if the

> decree were now being subjected to a collateral attack. In such a proceeding every intendment would be indulged in support of the decree, and whatever appeared in the record as having been done would be presumed to have been rightfully done."

It will be observed from the foregoing discussion that the court in effect held delivery to a person, who, in point of fact would in all probability deliver the subpoena to the defendant, was not sufficient in the absence of a showing of a strict compliance with the equity rule. Mrs. Harry Hinckley, to whom the subpoena was delivered, was in fact the sister-in-law of the defendant and the return showed that she was an adult person and residing in the usual place of abode of the defendant. Every argument which plaintiff makes in the instant case relative to the actual probability of the defendant having received the subpoena would be equally applicable to the Hinckley case. But the point of the decision is that the Supreme Court has prescribed by its equity rule XIII the conditions which it deems necessary to warrant the assumption that a substituted service by leaving copy with a third person would actually reach the defendant, and those conditions are (1) that the copy be left with an adult person, (2) who is a member of or resident in defendant's family, and (3) at the usual place of abode or dwelling house of the defendant. This is a method of substituted service. All authorities agree that such method of service must be strictly pursued.

The Blythe decision likewise disposes of the contention that this motion is a collateral attack upon the proceedings or upon the return of the marshal. Judge Morrow said:

> "The doctrine here invoked to support the decree would be applicable if the decree were now being subjected to a collateral attack."

In Estate of Davis, 151 Cal. 318, 323, the Supreme Court of California enumerates the various methods of direct attack. Speaking of probate orders such as appointment of administrator, etc. the court said:

> "Each can be attacked directly by appeal, or by some motion authorized by law for the purpose, or, perhaps, by bill in equity, but an attack made in a different proceeding in the same estate would clearly be collateral.

Peper Automobile Co. v. American Motor Car Etc. Co., 180 Fed. 245 (cited by us but ignored by counsel for plaintiff) is directly in point. That was a motion to quash service of summons in a law case, on the ground of want of jurisdiction over the person by reason of failure to serve the writ. Judge Pollock said, in part:

> "However, the question here presented is not one which arises as to the jurisdiction of the court over the subject-matter of the litigation. Jurisdiction over the subject-matter is conceded. The question here presented touches only this one matter: Did the court by the service of the summons, as shown by the return of the marshal, acquire jurisdiction over the person of the de-

fendant? The determination of this question must rest on the actual facts, and not upon the accuracy of the decision of the marshal of the question as to whether the defendant was at the date of the service doing business in the state and district, and if so, whether the person on whom the writ was served was the representative of the defendant in the doing of such business, for as defendant, by the declaration of plaintiff made for the purpose of showing the jurisdiction of the court over the subject-matter of the litigation, is alleged to be a corporate citizen of the state of New York, it must of necessity have been engaged in doing business in this jurisdiction, else it was not amenable to the process of this court without its consent. Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. ed. —; Peterson v. Chicago, Rock Island & Pac. Ry., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. ed. 841; Green v. Chicago, Burlington & Quincy Ry., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Wabash Western Railway v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431."

With respect to the contention that the plaintiff had a right to jury trial on the question of the sufficiency of the alleged service (a contention similar to Mr. Lewinson's demand for a hearing of this motion upon oral testimony), the court said:

"The only contention therefore raised for decision being one going to the correctness of the conclusion drawn by the marshal from appearance as set forth in his return that defendant was at the time of the service doing business in this state of such character and in such manner as to subject it to the jurisdiction of the court at the suit of plaintiff, and that Cody was its agent and representative in the transaction of such business, and the question thus decided and the result determined by the return of the marshal being one for the determination of this court as to its jurisdiction when questioned by the defendant in limine, prior to any general appearance in response to the command of the writ, there is, to my mind, no valid reason appearing why the court, without the intervention of a jury, may not and should not proceed to an investigation and decision of such question touching its jurisdiction so acquired over the person of defendant. The question presented is not such an issue of fact as entitles the plaintiff to a jury trial thereof as a matter of right under the Constitution and the statute. This has been the manner in which the precise question here presented has been determined by the courts under the accustomed practice, as evidenced by many adjudicated cases."

And the court denied a jury trial, held in effect that the matter was properly determinable upon affidavits, and basing the decision upon those affidavits quashed the service.

Bradley vs. Burrhus, 135 Ia. 324, is in point. The statute provided for service by leaving copy at residence, etc. In that case the copy of the summons was left with the defendant's wife. The court held that the statute, being one for substituted service, should be strictly construed and that the return could properly be shown to be false, for "as the court would not enter a judgment on a false return, if advised in advance, it should be free to set aside, as between the parties, at least when subsequently the falsehood is made to appear."

The authorities cited by plaintiff in this connection by no means uphold counsel's contention. Joseph vs. New Albany Etc. Co., 53 Fed. 180, proceeds upon a basis which renders it clearly distinguishable from this one, for the court there said:

> "It is not necessary to determine what the rule of law touching the question under consideration may be in other jurisdictions. This court has, by rule, adopted the statute of this state in regard to the service of process in actions at law; and therefore the statute of this state, as interpreted by its highest judicial tribunal, must rule the question in actions at law in this court."

Counsel for plaintiff impugn our good faith in this matter and, *waiving* the banner of fraud which has carried them through the case so far, assert that our motion is not made in good faith. They themselves have neglected to point out to the court the fact that the Joseph case was concerned with an interpretation of a state law and not a general rule of equity.

They have also neglected to call the court's attention to the later case decided by the Circuit Court of Appeals for the same Circuit,—Frank Parmalee Co. vs. Aetna Life Ins. Co., 16 Fed. 741, where the sheriff's return showed that service had been made by delivery of copy to one Gany as secretary of the defendant, when in truth he was not at the time of such service secretary or any other officer of the company upon whom summons could be served. With respect to such cases as the Joseph case, Judge Grosscup said:

> "But is this a case in which the return, in the Whelock case, cannot be challenged? Many cases are cited by defendant in error, illustrating the circumstances under which an officer's return upon a summons may not be contradicted. Bank of Eau Claire v. Reed, 232 Ill. 238, 240, 83 N. E. 820, 122 Am. St. Rep. 66; Brown v. Kennedy, 82 U. S. 600, 21 L. Ed. 193; Trimble v. Erie Electric Motor Co. (C. C.) 89 Fed. 51; Joseph v. New Albany etc., Co. (C. C.) 53 Fed. 180; United States v. Gayle (D. C.) 45 Fed. 107; Walker v. Cronkite (C. C.) 40 Fed. 133; Hunter v. Stoneburner, 92 Ill. 75, on page 79; Fitzgerald v. Kimball, 86 Ill. 396, 397; Reddish v. Shaw, 111 Ill. App. 337, 338; Irvin v. Smith, 66 Wis. 113, 27 N. W. 35, 28 N. W. 351; 18 Enc. Pleading & Practice, p. 967. But none of these cases bear any analogy to the case under review. Surely had appropriate action been taken in the action in which the summons was issued, the verity of the return might have been challenged and tried."

Von Roy vs. Blackman, Fed. Cas. No. 16,997, does use the language quoted at page 4 of plaintiff's brief, which language is characterized in note 2 to section 167a of Foster's Federal Practice (page 970) as dictum, which it truly is; for the court there held the return of service to be defective on its face because of the fact that it showed that the copy had been left with a person residing at defendant's domicile but did not show him to be a member of the family. The return also showed that the service was made upon a person over the age of fourteen years. Speaking of this decision, the author of 1 Street's Federal Equity Practice, at section 595, page 371, says:

> "The fact was not observed upon that the return also failed to show that the copy was left with an adult, though this was doubtless a fatal defect. In our law, a person is not an adult in either legal or common acceptance until he is of full legal age. In the civil law a male is adult at fourteen."

Trimble vs Erie Electric Motor Co., 89 Fed. 51, apparently proceeds, as did the Joseph case, upon a construction of state law. While it is not clear, the inference from Circuit Court rule 86, which is quoted on page 51, and the whole tenor of the decision, is that it was a question of state law, pure and simple, which was under consideration.

While the court in the Nickerson case, 223 Fed. 843, does use the language quoted by counsel for plaintiff, nevertheless it follows the suggestion made in this statement:

> "The rulings have nevertheless shown a drift, and the courts avow it in the direction of permitting an inquiry into the real facts, and allowing the return to stand or setting it aside in accordance with the facts as found by the court."

And the court then proceeded itself to inquire into the verity of the facts shown by the marshal's return, held that the return was substantially true in point of fact and that the return in form was insufficient and gave leave to amend the same. Counsel for plaintiff have neglected to call this court's attention to the fact that the truth of the marshal's return in the Nickerson case was actually canvassed by the court.

It seems fairly apparent, therefore, that the great weight of authority is that the court must, as a matter of strict legal right, examine into the truth of the marshal's return when challenged by a defaulted defendant and that in point of equity the court should do this very thing. Otherwise parties may, as in the instant case, be adjudged guilty of the "gravest frauds" without ever having had a hearing before the court and without in fact knowing of the dependency of the proceeding. The facility with which counsel for plaintiff have procured an amendment of the return in this case by a man who was no longer a public official but purported to act as such, and made a record which, on its face, was official when in truth and fact it was but the certificate or affidavit of a private individual, —illustrate the propriety of the rule that the return and the facts upon which it is predicated must, when the same are attacked, be closely scrutinized and the

truth or falsity of the same determined upon the motion or similar attack.

THE COPY OF SUBPOENA WAS NOT DELIVERED TO AN ADULT PERSON.

Under point II of plaintiff's brief counsel plead for a liberal interpretation of Rule XIII, such as will uphold the service in this case upon the showing made by the affidavits presented. They cite certain cases which involve the question of whether service is made at the residence or with a member of the family but they cite no case whatever in which it is held that a person who is under the age of majority is an adult in any sense of the word. They ignore the language of Street (cited in our opening memorandum and above quoted) in which he says that the service in the Van Roy case showing merely the leaving of a copy with a person over the age of fourteen years "was doubtless a fatal defect." For, he says: "In our law, a person is not an adult in either legal or common acceptance until he is of full legal age."

The affidavits of Mr. and Mrs. Thomason and of Rosamond Thomason Hunt herself, supported as they are by the birth record attached to Mr. Thomason's affidavit, cannot be gainsaid. Regardless of what may have been the testimony of Meryle Davis at the trial, that testimony itself cannot be considered here because it is hearsay on this motion. Moreover, she corrected that testimony at the trial and has, in the affidavit filed in opposition to plaintiff's motion for continuance, shown that in point of fact Rosamond

Thomason Hunt was at the time of service less than eighteen years of age.

Counsel would have the court hold that Rosamond was an adult because she was almost one,—just as in the Hinckley case the cross-complainant sought to uphold the service because in point of fact the subpoena would probably have been delivered by the sister-in-law to the defendant. Counsel overlook the fact that the portion of the rule under which they proceeded provides a method of substituted service which is the substantial equivalent of Section 412 of the California Code of Civil Procedure, and that the authorities universally declare that such modes of substituted service must be strictly pursued. The legislative authority (or in equity cases the Supreme Court) determines for itself what are the rules to be prescrbed as consistent with due process of law, by which a person can be brought within the jurisdiction of the court without being personally served with its writ, and the Supreme Court in this instance has said that the service must be upon an adult person. Not having prescribed in the rule or in any decision any special definition for the word "adult" we must go either to the common acceptance of the term or to the definition of the term as contained in the state statutes,—there being no federal pronouncement on the subject. Whichever way we turn we find the same result that a woman is not an adult until she is at least eighteen years of age. But counsel say that the court should interpret this matter liberally and, because of the proximity of the eighteenth birthday, hold that Rosamond was an

adult. If the court is authorized to depart from the clear requirement of the rule in this case, then what are the limits? Is each court in each instance to determine for itself what constitutes an adult and to do this without any rule whatever? If a person seventeen years and four months of age is to be held an adult is one of seventeen or of sixteen or of fourteen? Is the question to be determined by the apparent physical perfection or development of the person or by his or her mental maturity? Is there to be no guide, and is each court in each instance to be a law unto itself in the determination of its question? These questions answer themselves in the negative because they show the absurdity of the rule for which plaintiff's counsel contend.

We respectively submit that it is not for this court to say whether or not service upon a person slightly over seventeen years of age would probably have procured the delivery of the document to the defendant, when the Supreme Court has said that the person to whom delivery must be made in a case such as this must be an adult person,—in other words, when the Supreme Court has said in effect that, if not delivered to an adult person the writ is not to be presumed to have reached its ultimate destination.

Knowledge of the pendency of the suit or actual receipt of subpoena from a minor person is of no legal consequence.

Counsel make much of the fact that Jasper Thomason has not presented an affidavit in which he says that he did not receive from his daughter Rosamond

the copy of subpoena, or that he never received it from any other person and that, therefore, he is presumed to have come into actual possession of the same. We invite the court's attention to the fact that this question of actual receipt of the subpoena or actual knowledge of the pendency of the suit was injected into this matter by the affidavit of Mr. Lewinson, served on Saturday last; that while Jasper Thomason was able to make an affidavit at the time we first instituted this proceeding he is now in such physical and mental condition that an affidavit from him cannot be presented; that in the affidavit of Rosamond Mildred Hunt, verified April 26, 1925, and submitted in opposition to motion for continuance, she sets forth with more particularity the things which occurred at the time the marshal served or attempted to serve her, and particularly the fact that the subpoena "was never delivered to Jasper Thomason by her, and she verily believes that said subpoena was never delivered to said Jasper Thomason at any time" and "that the said subpoena left as aforesaid disappeared before the return of her said father Jasper Thomason, and she verily believes that the said subpoena never came into the possession of her said father at any time." But as we have said, the question of actual knowledge or of actual receipt of the process is legally inconsequential. Rule XV provides that, process shall be served by a marshal or his deputy "or by some other person specially appointed by the court or judge for that purpose, and not otherwise." There is no contention that Rosamond was ever specially appointed by the

court for the purpose of delivering this copy to her father, and to hold that such delivery by her, if made, was sufficient service would be directly in the teeth of Rule XV.

32 Cyc., page 462, says:

> "If all that the statute requires is done, it is immaterial that defendant in fact receives no actual notice thereof; and conversely, if the statute is not complied with it is of no avail that defendant does in effect receive actual notice of the action."

The point is well established as witness the following authorities:

> National Metal Co. vs. Greene Con. Etc Co. 11 Ariz. at page 110:
>
> The National Metal Company, appellant, brought suit against the Greene Consolidated Copper Company and another. A demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment thereon was rendered for the defendants. From this judgment plaintiff appealed.
>
> "The complaint, in the briefest substance, alleges that plaintiff is a foreign corporation not at any time engaged in the transaction of business in this territory except in isolated transactions in the nature of interstate commerce; that in March, 1903, the defendants sued the plaintiff in the district court of Santa Cruz County; that in that suit the sheriff made return of summons certifying that he had served the same upon one

Pellegrin, the agent of the plaintiff (defendant in that suit); that plaintiff did not appear in that action or answer therein; that on June 23, 1903, being the last day of the term of that court, the court rendered personal judgment by default against the plaintiff; that the said Pellegrin was not at the time of such alleged service, and never had been, the agent of the plaintiff in any manner or for any purpose whatsoever; that on April 4, 1903, an officer of the plaintiff received a letter, at the New York office of plaintiff, from A. L. Pellegrin & Co., stating that service of summons had been made upon them in the action referred to, and that they had notified both of the plaintiffs in that action and their attorneys that they were not, and never had been, the agents of plaintiff; that plaintiff did not receive either from Pellegrin & Co., or from any other source a copy of the summons; that at the time of said service the said Pellegrin gave notice to the sheriff serving him and to the plaintiffs in that action that he was not, and never had been the agent of the plaintiff for any purpose whatsoever; that after receiving notice of the rendition of the said judgment, plaintiff in November, 1903, filed in said action its motion to quash said pretended service of process and to vacate, annul and set aside said default judgment, which motion was denied. * * *

"Appellees urge that the complaint is defective in four respects. Only two of these require consideration. They are: '(1) That the appellant

having had actual knowledge of the pendency of the action, and the attempted service of process, in ample time to avail itself of its legal remedy, or to interpose a defense, it has no standing in an equitable action to vacate the service of process and judgment. (2) That the complaint is wholly insufficient in that it fails to allege that the false return of service was procured by the fraud of plaintiffs."

1. It seems manifest from the statements and argument of counsel that the trial court sustained the general demurrer to this complaint upon the authority of the decision of the Circuit Court of Appeals for the Seventh Circuit of Massachusetts. Benefit Life Assn. v. Lohmiller, 74 Fed. 23, 20 C. C. A. 274. The most pertinent expression in this case is: "If it be conceded that the complainant was not properly served, and that the judgment was voidable, or even void, that conditions is not of itself sufficient to warrant interference; but an equity must be presented aside from that bare circumstance, showing that the injured party was without knowledge, was taken by surprise, and had no opportunity, in fact, to obtain a hearing. So far as it appears from the allegation of this bill, the complainant may have possessed full and timely information of all the proceedings, but refrain from making any motion, relying upon the assumed defect, and if such were the fact the remedies are legal only. Neglect of the opportunity which was then open for a hearing would bar equitable relief." But

this expression must not be taken as a statement of a general rule, applicable in all situations. It must be understood in the light of the facts. In that case the association was engaged in business in the state and actual service had been made upon resident agents of the association, professedly under a general statute authorizing such service. The fact of agency was not disputed, but that a different agent should have been served was contended. It was not averred that the agents served, either collusively with the plaintiff in the action in which process was served, or at all, had failed to acquaint the proper officers with the service; but it was urged that service should have been made under a special statute, upon a special agent for service of process, and not under a general statute authorizing service upon any agent. Applied to those facts, the statements quoted have a very different bearing from that had if they are applied to the facts in this case; we cannot accept them as applicable to these facts. Here the plaintiff was advised by a stranger that the stranger had been served with process in a case against plaintiff. The credit it may have given to this information is immaterial. If it relied upon the information, and believed that a suit had been instituted against it, it nevertheless could appropriately ignore the matter, and assume that the court would not proceed to judgment until service should be made. A distinction is to be observed between knowledge of the pendency of a suit and

notice thereof. Jurisdiction can be acquired, if one does not submit himself to it, in no other way than by actual notice or by constructive notice. Actual notice is given only by personal service of process; constructive notice, by some form of substituted service. Some decisions which superficially may appear to oppose our conclusion may be reconciled with it by observing that it is often held, and properly so, that actual notice may sometimes be given, although there is a formal defect in the manner of service; in considering the matter the word "knowledge" is occasionally used inaccurately for "notice," and vice versa. In such case there has been service despite the informality. The time to attack such service by reason of such informality is prior to judgment. A failure so to attack the service may amount to a waiver of the informality; and one who has ignored such service, and thereby has lost an opportunity to be heard in the case, may have no just cause for complaint after judgment. But where there is no service there is no notice, irrespective of any knowledge which the defendant may acquire informally. Notice is given only by service of process. Informal knowledge will not supply it, and cannot be relied upon to put the one acquiring the knowledge upon notice or to force him into court to defend himself. The supreme court of the United States recognized this in Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 612, 19 Sup. Ct. 308, 43 L. Ed. 569. After reference to

certain notices provided to the company, it is said: "We do not intimate that mere knowledge or notice as thus provided would be sufficient without a service on the agent in the state where the suit was commenced." Again: "Process sent (to a nonresident) out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability." Pennoyer v. Neff, 95 U. S. 727, 24 L. Ed. 565. Still further: "No court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court or voluntarily appears." Mexican Cent. R. Co. v. Pinkney, 149 U. S. 209, 13 Sup. Ct. 865, 37 L. Ed. 699. "It is not sufficient," says Alderson on Judicial Writs and Process, pages 227, 228, section 111, "that a defendant have actual notice (knowledge) of a proceeding against him; he must be summoned in a lawful manner." The point we are making is clearly pointed out again by the supreme court of the United States in Fitzgerald Etc. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 39, 34 L. Ed. 608, as follows: "So that, whether the president of this company was inveigled into Lancaster county or not the service upon him amounted to no more than an informal notice only, and did not bring the company into court, and this the company was bound to know, and must be held to have known. Without regard to the evidence relied on to show that there was concealment of the circumstances in relation

to the service, knowledge of these circumstances was wholly immaterial, in view of the fact that the service was unavailing to bring the defendant into court, unless it chose to come there." * * * The distinction between actual service, though defective, and entire absence of service is interestingly illustrated in the decisions in the case of Capwell v. Sipe (C. C.), 51 Fed. 667, affirmed 59 Fed. 970, 8 C. C. A. 419. See, also, Hollingsworth v. Barbour, 4 Pet., at p. 476, 7 L. Ed. 922. If the allegations of the complaint in this case are true, there was no service whatsoever, and the judgment, though not void on its face, is void in fact; and plaintiffs' only adequate protection lies in this action. That it did not act upon the information acquired from Pellegrin was not neglect, was not "sleeping on its rights"; it was inaction in reliance upon its legal rights, in reliance upon the constitutional guaranty of due process of law. Such is not the inaction which bars relief in equity. To accomplish such a bar, it is said that the inaction must be such as amounts to "a violation of positive legal duty." Pomeroy's Equity Jurisprudence, 2d ed., sec. 856, p. 1187."

Wilmer v. Pica, 118 Md. at 550: Speaking of a case of service upon defendant's daughter, the court said:

"It does not matter that she may have been informed by her daughter of the nature of the proceeding."

Caldwell vs. Glenn, 6 Rob. (La.) 9: The citation in this case had been ineffectually served and the court said:

> "Knowledge of the suit on the part of the defendant, no matter how clearly brought home to him, will not supply the want of citation."

Osborne & Co. vs. Columbia Etc. Corporation, 38 Pac. 160, 161 (Wash.):

> "Two other reasons are suggested why the order of the lower court should be reversed; one is that the defendant had knowledge of the pendency of the suit and that such knowledge should be given the same force as proper service. But we are aware of no rule which compels a defendant to appear in a case until service has been made, requiring such appearance."

Harrell vs Mexican Cattle Co., 73 Texas, at 615: In this case the writ was served on one Swinney as secretary of defendant corporation. He was not elected to the office until three days after service and it was held that the service was void. The court said:

> "The third and fourth proposition submit that the evidence showed that the officers of the appellee corporation had actual notice of the issue of the writ of garnishment or at least knowledge of such facts as should affect them with constructive notice. We are of the opinion that these propositions are based upon a misapprehension of the law of the case. In ordinary actions courts acquire jurisdiction over the persons of defendants so as to render binding judgments against

> them by the service of process in the manner provided by law. Service may be waived by express stipulation in writing or by the voluntary appearance of the party either in person or by attorney. But we know of no authority for holding in any case that actual knowledge of the existence of a suit or the issue of a writ will supply the want of service. A defendant may know that a suit has been brought against him, yet he is not bound to take action until he has been duly served with process. He may justly conclude that the court will see that he has been duly cited before acting, and hence is not presumed to know of a judgment that has been rendered against him without jurisdiction.

Bradley Mfg. Co. vs. Burrhus, 135 Ia. 324. This case arose under a statute providing for service by leaving copy at residence, etc. The copy was left with the defendant's wife, and with respect to the impeachment of the officer's return the court said:

> "it need only be said that, as the statute prescribes the method of bringing a party into the court, it can be done in no other way; and the cases are uniform to the effect that his knowledge otherwise acquired, of the pendency of the proceedings, is matter of no moment. He is not chargeable until he becomes a party, and he can be made a party only by proper service of notice or by voluntary appearance."

Savings Bank vs Authier, 52 Minn. 98: The defendant was E. J. Daly. The writ was served on John

E. Dailey, who mailed it to the defendant with a letter of explanation and the same was received by the defendant several days before judgment entered. The court said:

> "The facts as to service being as above stated, it is perfectly useless to try to sustain the judgment, or to oppose the order setting it aside. The transmission of the summons by mail was wholly unauthorized by law as a mode of service, and of no more effect, although the defendant received it, than would have been his finding it in the street if it had been lost. The statute not only prescribes that service shall be made by delivering a copy thereof to the defendant personally (special provision being, however, made for a different mode of service at the house of his usual abode) but it in terms declares that the provision with reference to the service by mail of notices and other papers in actions shall not apply to the service of a summons.
>
> The judgment being void for want of jurisdiction, the respondent was entitled to have it set aside, even though he made no showing of a meritorious defense."

Wilcke vs Duross, 144 Mich. 243: *Sylabus:*

> "Where, in a suit in Justice's Court, process was *my* mistake served upon defendant's daughter of the same name, instead of upon defendant, and defendant did not appear, the judgment founded thereon is void, and is properly set aside in chancery, though defendant knew of the mistake

in service on the day it was made and was kept advised by counsel of the progress of the case."

O'Connell vs Gallagher, 104 N. Y. App. Div. 492: In this case the process server thought that he was serving the defendant Gallagher but he served another person who let it drop to the floor and a servant of the defendant found it and delivered it to the defendant. The court said:

> "The fact that the summons and complaint is found upon the floor of the house, or in the street by a defendant in an action, or is delivered to a defendant in the action by one so finding it, is not the service that the Code of Civil Procedure requires, and defendant is under no obligation to appear and answer because a copy of the summons in an action in which he is named as a defendant comes incidentally into her possession when there is no delivery of the summons as a service upon her. Under such circumstances the defendant was justified in waiting until the judgment was sought to be enforced. The question of laches, therefore, cannot be considered, as the defendant had the legal right to have this judgment set aside at any time upon it appearing that it had been entered without actual service of the summons * * *"

Kochman vs O'Neill, 202 Ill. 110: In this case service of summons was made by reading it to the defendant's daughter, the statute apparently permitting of service upon the defendant by reading to him. The daughter told her mother about the incident the

same evening of the attempted service but the court held the service void.

The burden of plaintiff's insistence upon the court's setting this matter down for oral evidence is that by cross-examination plaintiff could develop that in fact defendant Thomason actually knew of the suit and actually received the copy of subpoena. We submit that the authorities abundantly show that the issue is a false one and that if counsel for plaintiff could establish all the facts that he claims it would avail him nothing. Plaintiff stands upon a record which shows service on Miss Thomason and not on defendant Jasper Thomason. The only question involved is whether Miss Thomason was an adult at that time. It is asking the court to lend an undue amount of credulity to the assertions of counsel when they insist upon reopening this matter and placing it on the calendar for further trial when the court has before it the official record of the Bureau of Vital Statistics, the affidavit of the party served and that of her mother and father as to the date of her birth. Counsel's surmise that these records and affidavits are all false and that perchance he could prove them to be so, is rather far fetched.

The suggestions of counsel that there has been la*t*ches in this case and that this motion cannot be granted without the showing of "injury" are answered by the above cited authorities, particularly the cases of—National Metal Co. vs Greene, 11 Ariz. 108, and O'Connell vs Gallagher, 104 N. Y. App. Div. 492.

Of course, there is no question as to the power of Judge James to set aside a void judgment rendered by Judge Bledsoe.

Hall v. M'Kinnon, 193 Fed. 574;
Birch v. Steele, 165 Fed. 584;
Ide v. Crosby, 104 Fed. 582;
2 Foster's Fed. Prac. 88 256.

Respectfully submitted,
A. W. Ashburn
Wm T. Kendrick
Solicitors for Defendant Jasper Thomason appearing specially herein.

[Endorsed]: In Equity No. Eq. D-61-J IN THE United States District Court, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION FRANCES INVESTMENT COMPANY, a corporation Plaintiff vs. FRIEND J AUSTIN et al Defendants REPLY BRIEF ON MOTION TO QUASH Received copy of the within this 30th day of April 1925 Lewinson & Barnhill Attorneys for Plaintiffs Filed Aug 5 - 1925 Chas N. Williams Clerk R S Zimmerman Deputy NEWLIN & ASHBURN 935 Title Insurance Building Telephone Main 0159 LOS ANGELES, CAL. Solicitors for defendant Jasper Thomason appearing specially

At a stated term, to wit: the July, A. D., 1920 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court room thereof, in the City of Los Angeles, on Monday, the fifteenth

day of November in the year of our Lord one thousand nine hundred and twenty;

Present:

The Honorable Benjamin F. Bledsoe, District Judge.

Frances Investment Co., Plaintiff,	)	
vs.	)	No. D-61 Equity.
Friend J. Austin & Robert B. Walker, et al., Defendants.	)	

This cause coming on at this time for hearing on motion to dismiss; Jos. L. Lewinsohn, Esq., and William Story, Jr., Esq., appearing as counsel for plaintiff; and James E. Kelby, Esq. and Joe Crail, Esq., appearing as counsel for defendant; James E, Kelby, Esq., and Joe Crail, Esq., counsel for defendants, having presented arguments in support of said motion to dismiss; Jos. L. Lewinsohn, Esq., counsel for plaintiff having argued in opposition to said motion, and James E. Kelby, Esq., counsel for defendants, having argued in reply thereto; and Jos. L. Lewinsohn, Esq., counsel for plaintiff, having moved the Court for leave to amend amended supplemental bill by interlineation is hereby granted; Joe Crail, Esq., counsel for defendants moved to be allowed to amend Answer of Gill, and the Court ordered that ruling on said motion be held in abeyance for defendant to make further application if the present motion to dismiss is denied; and James E. Kelby, counsel for defendants, having been granted

by the Court one day within which to serve and file authorities on plaintiff, and plaintiff granted a like time within which to reply thereto, said cause is thereupon ordered submitted to the Court for its consideration and decision.

UNITED STATES OF AMERICA

District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

In Equity

The President of the United States of America, Greeting!

To Jasper Thomason and Meryle T. Davis.

You Are Hereby Commanded, That you be and appear in said District Court of the United States aforesaid, at the Court Room in Los Angeles on or before the twentieth day, excluding the day of service, after service of this subpoena upon you, to answer a Amended Supplemental Bill of Complaint exhibited against you in said Court by Frances Investment Company, a corporation organized and existing under and by virtue of the Laws of Utah and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under penalty of FIVE THOUSAND DOLLARS.

Witness, The Honorable Benjamin F. Bledsoe, Judge of the District Court of the United States, this 9th day of May in the year of our Lord one thousand nine

hundred and twenty-one and of our Independence the one hundred and forty-fifth.

Chas. N. Williams, Clerk.
By R S Zimmerman Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12 OF RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES PROMULGATED BY THE SUPREME COURT, NOVEMBER 4, 1912.

On or before the twentieth day after service of the subpoena, excluding the day thereof, the defendant is required to file his answer or other defense in the Clerk's Office;
otherwise the Bill may be taken pro confesso.

Chas. N. Williams Clerk.
By R S Zimmerman Deputy Clerk.

Amended Return) United States Marshal's
Francis Invest. Co.) Office
vs. D-61) Southern District of Cal-
Friend J. Austin, et al.) fornia.

I Hereby Certify and Return that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Jane Doe, whose true name is to the undersigned unknown and who is and on said 13th day of May, 1921, was an adult person and a member of the family and resident in the family of Jasper Thomason. Said defendant named therein, at the County of Los Angeles, in said District, an attested copy thereof, at the dwell-

ing house and usual place of abode of said Jasper Thomason, one of said defendants herein.

C. T. Walton

Form No. 570.

Amended Return		) United States Marshal's
Francis Invest. Co.		) Office,
vs.	D 61	) Southern District of Cali-
Friend J. Austin, et al.		) fornia.

I Hereby Certify and Return, that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason an adult person, who is a member or resident in the family of Jasper Thomason Said defendant named therein, at the......County of Los Angeles in said District, an attested copy thereof, at the dwelling house or usual place of abode of said Jasper Thomason one of said defendants herein.

C. T. Walton

~~A. C. Sittel~~ U. S. Marshal.

By W S Walton, Deputy.

Los Angeles, Calif.

October 4, 1923.

No. D 61 Frances Inv. Co. vs. Friend J. Austin, et al. Filed 10/4/23 CHAS. N. WILLIAMS, Clerk. By Edmund L Smith Deputy Clerk.

Clerk U. S. District Court Southern District of California.

By R. S. Zimmerman, Deputy

Filed Oct. 12, 1923

CHAS. N. WILLIAMS, Clerk

By Edmund L Smith, Deputy Clerk

hundred and twenty-one and of our Independence the one hundred and forty-fifth.

Chas. N. Williams, Clerk

resident in the family of Jasper Thomason. Said defendant named therein, at the County of Los Angeles, in said District, an attested copy thereof, at the dwell-

ing house and usual place of abode of said Jasper Thomason, one of said defendants herein.

C. T. Walton
~~A. C. Sittel~~ U. S. Marshal
By W S Walton, Deputy

Los Angeles, Calif.
October 4, 1923
Order fld 7/15/25 nunc pro tunc as of 10/4/23

No D61 Frances Inv. Co. vs. Friend J. Austin et al Filed 10/4/23 CHAS. N. WILLIAMS Clerk By Edmund L Smith Deputy Clerk

State of California,)
)ss
County of Los Angeles.)

W. S. Walton, being first duly sworn, deposes and says: I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason, an adult person who was then a member or resident in the family of Jasper Thomason, said defendant named therein, at the county of Los Angeles, State of California, an attested copy thereof, at the dwelling house or usual place of abode of said Jasper Thomason, one of said defendants herein. At said times above mentioned I was a duly qualified and acting Deputy United States Marshal for the Southern District of California.

W. S. Walton,

Subscribed and sworn to before me
this 5th day of October, 1923.
(Seal) Chas. N. Williams
Clerk U. S. District Court Southern District of California.
By R. S. Zimmerman, Deputy

Filed Oct. 12, 1923
CHAS. N. WILLIAMS, Clerk
By Edmund L Smith, Deputy Clerk

UNITED STATES MARSHAL'S OFFICE }ss:
SOUTHERN DISTRICT OF CALIFORNIA

I Hereby Certify, That I received the within writ on the 9th day of May, 1921, and personally served the same on the 13 day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason for Jasper Thomason said defendant named therein, personally, at the County of Los Angeles in said district, a copy thereof

Los Angeles,
May 13th, 1921

C. T. WALTON,
U. S. Marshal.
By W. S. Walton,
Deputy.

To the Marshal of the United States for the Southern District of California:

Pursuant to Rule 12, the within subpoena is returnable into the Clerk's Office twenty days from the issuing thereof.

Subpoena Issued May 9th, 1921

Chas. N. Williams
Clerk.
By R S Zimmerman
Deputy Clerk.

[Endorsed]: Marshal's Civil Docket No. 4392 No. D-61 Equity United States District Court SOUTHERN DISTRICT OF CALIFORNIA IN EQUITY FRANCES INVESTMENT COMPANY, a corporation vs. FRIEND J. AUSTIN, Lettie M. Austin, et al. Alias SUBPOENA FILED JUN 10 1921 CHAS. N. WILLIAMS, Clerk By P W Kerr Deputy Clerk

At a stated term, to wit: the July A. D., 1923 term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the city of Los Angeles, on Friday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Present:

The Honorable Benjamin F. Bledsoe, District Judge.

Frances Investment Co.,)
)
Plaintiff,)
)
vs.)
Friend J. Austin, Lessie E.)
Austin, his wife, William)
Martin Belford; Anna Marie)
Belford, his wife, The Peoples)
Abstract & Title Co., a corp.,)
H. F. Davis and Myrle T.)
Davis his wife, John W. Aus-)
tin & Laura A. Austin, his)
wife; Jasper Thomason;)No. D-61 Equity S. D.
Thomas Edwin Gill & Myra)
*Pi*tzinger Gill, his wife,)
Harry D. Aron, Carrie A.)
Banta, individually and as)
Executrix of the Estate of)
T. P. *Canta,* deceased; Rob-)
ert B. Walker; Imperial)
Water Co. No. 1; Imperial)
Water Co. No. 2; Imperial)
Water Co. No. 3; Wade N.)
Boyer and Leah Boyer, his)
wife, Paul H. Marley; F. M.)
Rubbles; and J. Wolfe,)
Defendants.

This cause coming on at this time for further trial; *********

The motion of plaintiff to amend its complaint having been granted and

The motion of defendant Gill to amend answer having been granted to conform to the proofs and issues raised and

****

****

It is by the court ordered that plaintiff file its brief within twenty days, that defendant have twenty days to answer and that plaintiff have ten days to reply thereto; and the court having thereupon ordered that a date for oral argument be set after said briefs have been filed, the court takes a recess in this cause at the hour of 3:45 o'clock P. M.

UNITED STATES OF AMERICA

District Court of the United States Southern District of California

****

Frances Investment Co., a corp.,)
) CLERK'S OFFICE
v.) No. Eq. D-61
) PRAECIPE
Jasper Thomason, et al.,)

TO THE CLERK OF SAID COURT:

Sir:

Please issue enter a decree pro confesso against the defendant Jasper Thomason.

Wm. Story, Jr.
Joseph L. Lewinson
Attys for plf

FILED OCT. 12, 1923 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

***

Frances Investment Company,)
a corporation,)
)
Plaintiff,)
vs.) No. D 61 Equity
)
Friend J. Austin, et al.,)
)
Defendants.)

Subpoena in the above entitled action having been duly served upon defendant, —JASPER THOMASON on the 13th. day of May, 1921, in the County of Los Angeles, State and Southern District of California, and the time within which said defendant should have filed his answer or other defense to the bill in the Clerk's Office having expired, and no answer or other defense to the bill having been filed in the Clerk's Office on behalf of the said defendant, Now, Therefore, on motion of Wm. Story, Esq. and Joseph Lewinsohn, Esq. Solicitors for the complainant, it is ordered that the Default of said defendant JASPER THOMASON be and the same hereby is entered herein, and that complainants' said bill of complaint be and the same hereby is taken pro confesso as against said defendant JASPER THOMASON, and that all the matters and things therein prayed for be decreed accordingly.

CHAS. N. WILLIAMS, Clerk
By R S Zimmerman, Deputy Clerk

FILED AND ENTERED OCTOBER 12, 1923.

CHAS. N. WILLIAMS, Clerk
By R S Zimmerman, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	
v.	
FRIEND J. AUSTIN, LETTIE M. AUSTIN, HIS WIFE, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, HIS WIFE, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS AND MERYLE T. DAVIS, HIS WIFE, JOHN W. AUSTIN AND LAURA A. AUSTIN, HIS WIFE, JASPER THOMASON, JESSE BOYD PILCHER, THOMAS EDWIN GILL AND MYRA RITZINGER GILL, HIS WIFE, HARRY D. ARON, T. P. BANTA, ROBERT B. WALKER, JOHN DOE, RICHARD DOE, JOHN ROE, RICHARD ROE, SARAH DOE, JANE DOE, SARAH ROE, JANE ROE, A-1 COMPANY, a corporation, B-1 COMPANY, a corporation, C-1 COMPANY, a corporation, IMPERIAL WATER COMPANY NO. 1, IMPERIAL WATER COMPANY NO. 3, IMPERIAL WATER COMPANY NO. 5,	IN EQUITY Eq. D-61 FINAL DECREE

WADE N. BOYER and LEAH)
A. BOYER, HIS WIFE,)
)
Defendants.)

This cause came on to be further heard at this term, and thereupon, upon consideration thereof, IT WAS ORDERED, ADJUDGED AND DECREED as follows, viz:

1. That defendants Friend J. Austin and Lettie M. Austin are indebted to plaintiff on the promissory note dated January 1, 1916, set forth in the bill of complaint, to which reference is hereby made, in the principal sum of $55,000.00, with interest thereon for three years at six per cent (6%) amounting to $9900.00, less $1965.45 paid on account of interest, principal and interest aggregating $62,934.65, with interest thereon from January 1, 1919, to March 24, 1925, at the rate of eight per cent (8%) per annum, in accordance with the terms of said note, amounting to $31,383.20, the total of the before mentioned sums on account of principal and interest being the sum of $94,317.75. Said defendants are also indebted to plaintiff upon said note for plaintiff's costs of suit which shall be taxed in accordance with the practice of this court, together with a reasonable attorney's fee, which is fixed at $10,000.00. All of the before mentioned sums are now due and owing from said defendants to plaintiff, and plaintiff is given judgment therefor.

2. That at all times since January 1, 1916, the before mentioned indebtedness was and now is secured by the deed of trust executed January 1, 1916, as set

forth in the bill of complaint, and by the assignment and transfer of promissory notes, mortgages, shares of water stock, and other personal property, as set forth in said bill of complaint; and plaintiff has had, and now has a prior and first lien upon the real and personal property described in said trust deed and said mortgages, and as alleged in said bill of complaint, including the water stock and promissory notes mentioned therein.

3. That the proceeding for registration of title referred to in said bill of complaint, supplemental bill of complaint and amended supplemental bill of complaint, which has resulted in a decree of registration made and entered on or about December 7, 1917, was instituted and conducted for the purpose of defrauding plaintiff of its security, as aforesaid, or a considerable portion hereof, and the decree rendered therein was procured by fraud upon the court that rendered the same; that plaintiff herein was intentionally omitted as a party to said proceeding, and said decree is not binding on plaintiff herein; all as alleged in said bill of complaint, said supplemental bill of complaint and said amended supplemental bill of complaint. (For brevity said bill of complaint, said supplemental bill of complaint and said amended supplemental bill of complaint are all together hereinafter sometimes referred to as "bill of complaint", and the term "bill of complaint" is sometimes used as including supplemental bill of complaint and/or amended supplemental bill of complaint, and shall be taken to mean the pleading which is appropriate. All of the allegations in said

bill of complaint, supplemental bill of complaint, an amended supplemental bill of complaint shall be deemed to be incorporated herein by reference.)

4. That subsequent to October 1, 1917, the real and personal property above referred to, which had theretofore been mortgaged, transferred, assigned, and/or pledged to plaintiff as security for aforesaid indebtedness, was transferred and conveyed to the various defendants as alleged in the bill of complaint; that at the respective times of said transfers, and at all times since, said defendants, and each of them, had knowledge and notice that the defendants Friend J. Austin and Lettie M. Austin were indebted to plaintiff in accordance with the terms of the aforesaid promissory note, and that said promissory note was secured as in said bill of complaint alleged; and in particular at the time of the transfer of a certain parcel of the real estate before referred to, together with certain water stock, to the defendants T. Edwin Gill and Myla Ritzinger Gill, as in said bill of complaint alleged, and as in their answer alleged, to which reference is hereby made, the said defendants T. Edwin Gill and said Myla Ritzinger Gill had such knowledge and notice; that none of the defendants, including said T. Edwin Gill and Myla Ritzinger Gill, were or are bona fide purchasers for value, and without notice of plaintiff's rights in the premises.

5. That the rights and claims of the defendants in and to the property securing the before mentioned indebtedness to plaintiff or to any part thereof, and in particular the rights and claims of the defendants

T. Edwin Gill and Myla Ritzinger Gill are junior, subject and subordinate to the liens, claims and charges of plaintiff under the aforesaid deed of trust, mortgages, pledges, assignments, and transfers of real and personal property, including water stock referred to in said bill of complaint.

6. That plaintiff is entitled to the foreclosure and sale of its security as aforesaid, in accordance with the terms of said trust deed, mortgages, pledges, assignments and transfers, as alleged in its bill of complaint, and to the appointment of a receiver of the real and personal property comprising said security, pending the sale thereof, and to an accounting from each and all of the defendants for the rents, issues, profits, fruits and avails of any real or personal property comprising said security, or any part thereof, that said defendants, or any of them, may have reaped or enjoyed since October 2, 1917, on which date said proceeding for registration was commenced, and for the application of the same to the satisfaction of the before mentioned indebtedness to plaintiff.

7. That L. M. Chapman be, and he hereby is appointed Special Master, and is empowered, authorized, ordered and directed to foreclose and sell said property comprising plaintiff's security, and each and all thereof, in accordance with the terms and provisions of the various instruments creating the same, with the same force and effect as if he were specially named therein, and in accordance with the provisions of the statutes of California relative to pledges, and such other provisions of the statutes of California as

may be applicable, or in the alternative in accordance with the practice of this court, and the further directions of the court; and as such Special Master he is also empowered and authorized to take an accounting between the plaintiff and the defendants, or any of them, wherever provided for in this decree, in accordance with the practice and further directions of this court. And in that behalf said Special Master is authorized and empowered to appoint times and places for hearing, issue, subpoenaes, administer oaths, and take evidence, both oral and documentary.

8. That if the money arising from the sale of the property comprising plaintiff's security, as aforesaid, shall be insufficient to pay the amount found due plaintiff, as above stated, with interest and costs and expenses of sale, including the expenses of the receiver hereinafter named, and of said Special Master, said Special Master shall specify the amount of such deficiency on his report to the court, and on the coming in of said report, judgment of this court shall be docketed for such balance against defendants Friend J. Austin and Lettie M. Austin, and against the defendants Jasper Thomason and H. F. Davis, but said judgment as to said Jasper Thomason and H. F. Davis shall be for not to exceed the highest and best value of the property comprising plaintiff's security at any time between October 2, 1917, and the date of this decree, together with the value of any of the fruits, avails, rents, issues and profits of said security, or any part thereof, that has come into the hands of said defendant H. F. Davis and said defendant Jasper Thomason,

and in that behalf it is found and adjudged that said defendants H. F. Davis and Jasper Thomason, together with the defendants Friend J. Austin and Lettie M. Austin and Meryle T. Davis committed all and singular the frauds charged against them in said bill of complaint, and said judgment is not made against said Meryle T. Davis because by inadvertence and mistake she was not served with process in said cause; and it is further ordered that said Special Master take all necessary and proper steps to fix the amount due under the terms hereof from said Jasper Thomason and H. F. Davis.

9. That Jerry H. Powell is appointed receiver of the properties comprising plaintiff's security, and each and all of them, and is ordered to take hold and conserve the same until the sale thereof by said Special Master, and while so holding the same to collect the rents, issues and profits thereof, and pay the same over to said Special Master from time to time, as soon as reasonably may be. Said receiver shall qualify by giving bond in the sum of $5,000.00 in terms to be approved by the Clerk of this Court.

10. That the stipulation for decree heretofore entered into by and between the defendants Harry D. Aron, Paul H. Marley, Robert B. Walker, and the defendant John W. Wolfe on the one hand and plaintiff on the other, which is on file herein, and to which reference is made, is approved, and judgment rendered in accordance therewith, and said Special Master will resp*d*ct and abide by said stipulation, but said stipulation shall not be deemed to restrict the relief granted

plaintiff hereby except as to the defendants named in said stipulation, and except further that the sums paid over to plaintiff by reason of the judgment on said stipulation and the sale of the lands therein described, shall be charged to the plaintiff and credited upon the aforesaid indebtedness to plaintiff.

11. That reference is hereby made to certain stipulations on file between plaintiff and defendants T. Edwin Gill and Myla Ritzinger Gill, and the defendants mentioned therein shall forthwith pay over to said Special Master sums due and payable by them in accordance with said stipulations.

12. That the allegations in subdivision Sixteenth of pleas and affirmative defenses in the separate answer of defendant Paul H. Marlay in so far as they relate to further security being given plaintiff in the form of a mortgage or trust deed on Utah lands and foreclosure of the same are true, and plaintiff shall proceed with reasonable diligence to cause sale to be made of the real property in Utah ordered to be sold by decree of the United States District Court for the State of Utah, and upon sale being made to furnish said Special Master with a certified copy of the proceedings in the United States District Court for the State of Utah showing said sale, the price realized thereupon and the money paid over to plaintiff thereunder; whereupon plaintiff shall be charged with the sum so actually paid over and credit be allowed defendants accordingly. Said Special Master shall not proceed to foreclose and sell the property comprising plaintiff's security hereinbefore mentioned until he shall

have been furnished with the report of said sale and proceedings in the United States District Court for the District of Utah, as aforesaid.

13. Said Special Master shall apply and disburse the moneys realized from the sale of the properties comprising plaintiff's security as aforesaid, in the following manner:

1st: The payment of all proper expenses attendant upon said sale or sales, including the expenses, outlays and compensation of the Special Master to make said sale or sales as approved by further order of this Court.

2nd: To the payment of the expenses, outlays and compensation of said receiver as fixed by further order of this court.

3rd: To the payment of the costs and expenses of this suit subsequent to the date of this decree, including counsel fees fixed and allowed by this court.

4th: To the payment of the indebtedness due plaintiff hereunder as aforesaid, with costs of suit taxed in accordance with the practice of this court as aforesaid, together with legal interest upon all of said sums from date hereof.

5th: If after making all of the above payments there shall be any surplus the same shall be paid according to the further order of this Court in that regard.

14. That all of the allegations of the bill of complaint, supplemental bill of complaint and amended supplemental bill of complaint are true except as herein otherwise expressly found, and except that the defend-

ants T. Edwin Gill, Myla Ritzinger Gill, Marlay, Aron, Walker and Wolfe were not parties to the conspiracy to defraud plaintiff, as alleged in said bill of complaint, and did not have direct personal knowledge of all of the facts and circumstances comprising the fraud charged in said bill of complaint, but said defendants were, nevertheless, at all times herein mentioned cognizant of facts and circumstances which were sufficient to excite suspicion, and did excite suspicion in their minds of the frauds charged in said bill of complaint, and said defendants, and each of them, in the exercise of reasonable, or any diligence, would have discovered all of the facts and circumstances of the frauds charged in said bill of complaint, and as a matter of fact and law were at all times herein chargeable therewith.

15. That jurisdiction of this cause is retained by this court for the purpose of enforcing this decree and granting relief in furtherance or execution of the same or supplemental thereto, and plaintiff may apply to the court for further orders and directions at the foot of the decree.

16. The following real property, among others, is affected by this decree:

The following described premises situate in Imperial County, California, viz:

The East one half (½) of Section twenty (20), Township twelve (12) South, Range fourteen (14) East, San Bernardino Meridian, containing 320 acres, more or less, together with 300 shares of the capital stock of Imperial Water Company No. 3, a corporation

organized and existing under the laws of California, some time evidenced by Certificates Nos. 149 and 463 of said Company, for 150 shares each.

Also the following described premises situate in Imperial County, Caifornia, viz:

The Southwest Quarter of Section four (4), Township twelve South, Range Fifteen (15) East, S. B. B. & M., together with the water right thereto, some time evidenced by Certificate No. 14 for 150 shares of the stock of Imperial Water Company No. 3, a corporation organized under the laws of California.

Also the following described premises situate in Imperial County, California, viz:

The Southeast Quarter of the Northwest Quarter, the Southwest Quarter of the Northeast Quarter, and Lots eight (8) and Ten (10) of Section three (3), Township Fourteen (14) South, Range sixteen (16) East, S. B. B. & M., together with the water rights therefor, some time evidenced by Certificate No. 2303 for 134 shares of the capital stock of Imperial Water Company No. 5, a California corporation.

$5000.00 of attorneys fees shall be chargeable against parcels transferred to defendants Gill and Gill.

That any and all cross-bills and counter-claims on file be and the same are hereby dismissed.

Dated March 24, 1925.

Benjamin F. Bledsoe
District Judge.

Costs are taxed at $248.98/100
Decree entered and recorded MAR. 24, 1925
CHAS. N. WILLIAMS, CLERK
BY: Edmund L. Smith, Deputy Clerk.

[Endorsed]: No. Eq. D-61 IN THE United States District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division Frances Investment Company, a corporation, Plaintiff vs. Friend J. Austin, et al, Defendant FINAL DECREE FILED MAR 24, 1925 CHAS. N. WILLIAMS, Clerk by Edmund L Smith Deputy Clerk LEWINSON & BARNHILL 215 West Seventh Street Los Angeles Telephone Metropolitan 0330 Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation,	In equity
	Eq. D-61
Plaintiff,	
vs.	PRAECIPE FOR ENTRY OF SPECIAL APPEARANCE
FRIEND J. AUSTIN, et al.,	
Defendants.	

TO THE CLERK OF THE ABOVE NAMED COURT:

You are hereby requested and directed to enter the special appearance of the defendant Jasper Thomason in the above entitled action, who appears specially herein through the undersigned, his solicitors, for the sole purpose of moving this Court to quash service of

subpoena herein, and to vacate and set aside that certain order pro confesso made herein on the 12th day of October, 1923, and to vacate and set aside as to said defendant, the "final decree" entered herein on the 24th day of March, 1925, upon the ground that this Court has not and at no time has had jurisdiction over the person of said defendant. The said defendant does not appear generally in the said cause, but makes a special appearance only for the purpose of contesting the jurisdiction of the Court over his person.

Dated this 15th day of April, 1925.

WM. T. KENDRICK
NEWLIN & ASHBURN

Solicitors for Defendant Jasper Thomason, so appearing specially herein.

[Endorsed]: IN EQUITY No. Eq. D-61-J In the United States District Court, In And For The SOUTHERN DISTRICT OF CALIFORNIA, Southern Division FRANCES INVESTMENT COMPANY a corporation Plaintiff vs. FRIEND J. AUSTIN, et. al. Defendants PRAECIPE FOR ENTRY OF SPECIAL APPEARANCE FILED APR 15, 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk NEWLIN & ASHBURN 935 Title Insurance Building Telephone Main 0159 Los Angeles, Cal. Defendant Solicitors for Defendant Jasper Thomason appearing Specially

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

<table>
<tr>
<td>FRANCES INVESTMENT COMPANY, a corporation

Plaintiff,

vs

FRIEND J. AUSTIN, LETTIE M. AUSTIN, HIS WIFE, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, HIS WIFE, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation H. F. DAVIS AND MERYLE T. DAVIS, HIS WIFE, JOHN W. AUSTIN AND LAURA A. AUSTIN, HIS WIFE, JASPER THOMASON, JESSE BOYD PILCHER, THOMAS EDWIN GILL AND MYRA RITZINGER GILL, HIS WIFE, HARRY D. ARON, T. P. BANTA, ROBERT B. WALKER, JOHN DOE, RICHARD DOE, JOHN ROE, RICHARD ROE, SARAH DOE, JANE DOE, SARAH ROE, JANE ROE, A-1 COMPANY, a corporation, B-1 COMPANY, a corporation, C-1 COMPANY, a corporation, IMPERIAL WATER COMPANY No. 1, IMPERIAL WATER COMPANY NO. 3,</td>
<td>IN EQUITY
Eq. D-61-J
MOTION TO QUASH SERVICE OF SUBPOENA, ETC.</td>
</tr>
</table>

IMPERIAL WATER COM-)
PANY NO. 5, WADE N.)
BOYER AND LEAH A.)
BOYER, his wife,)
Defendants.)

Now comes the defendant Jasper Thomason, appearing specially herein, for the sole purpose of making this motion and not appearing generally herein, and now moves this Honorable Court for an order quashing service of subpoena upon him, the said defendant in the above entitled action, and vacating and setting aside that certain order Pro Confesso made in the above entitled action on the 12th day of October, 1923, and vacating and setting aside as to this defendant that certain "Final Decree" entered in this cause on the 24th day of March, 1925. This motion is made upon the grounds that no subpoena in this cause was ever delivered to this defendant personally and that the only service or attempted service of subpoena herein was made by leaving a copy thereof with Rosamond Mildred Thomason on the 13th day of May, 1921, at a time when the said Rosamond Mildred Thomason was under the age of eighteen years and was not an adult person; that no service or attempted service of subpoena herein was made upon any other person or at any other time than upon the said Rosamond Mildred Thomason on said 13th day of May, 1921; that this defendant has not heretofore been served in the manner required by law with subpoena in this action nor has he voluntarily appeared herein nor has he waived due service of process upon him, and that this court is now and has been at all times

without jurisdiction over the person of this defendant, who has appeared and who appears herein solely and only for the purpose of making this motion on the ground of want of jurisdiction over his person.

Dated this 27th day of April, 1925.

Wm. T. Kendrick
Newlin & Ashburn

Solicitors for said defendant so appearing specially herein.

[Endorsed]: IN EQUITY No. Eq. D-61-J In The UNITED STATES DISTRICT COURT, In and For The Southern District Of California, Southern Division FRANCES INVESTMENT COMPANY a corporation Plaintiff vs FRIEND J. AUSTIN, et. al. Defendants MOTION TO QUASH SERVICE OF SUBPOENA, ETC. FILED APR 27 1925 CHAS. N WILLIAMS, Clerk By Edmund L. Smith deputy clerk W. T. Kendrick NEWLIN & ASHBURN 935 Title Insurance Building Telephone Main 0159 Los Angeles, Cal. Solicitors for Defendant Jasper Thomason appearing specially.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT)
COMPANY, a corporation,)
)
Plaintiff,)
)
vs.)
)

FRIEND J. AUSTIN, LETTIE M. AUSTIN, HIS WIFE, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, HIS WIFE, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS AND MERYLE T. DAVIS, HIS WIFE, JOHN W. AUSTIN AND LAURA A. AUSTIN, HIS WIFE, JASPER THOMASON, JESSE BOYD PILCHER, THOMAS EDWIN GILL AND MYRA RITZINGER GILL, HIS WIFE, HARRY D. ARON, T. P. BANTA, ROBERT B. WALKER, JOHN DOE, RICHARD DOE, JOHN ROE, RICHARD ROE, SARAH DOE, JANE DOE, SARAH ROE, JANE ROE, A-1 COMPANY, a corporation, B-1 COMPANY, a corporation, C-1 COMPANY, a corporation, IMPERIAL WATER COMPANY NO. 1, IMPERIAL WATER COMPANY NO. 3, IMPERIAL WATER COMPANY NO. 5, WADE N. BOYER and LEAH A. BOYER, HIS WIFE, Defendants.	IN EQUITY. Eq. D-61-J NOTICE OF MOTION FOR CONTINUANCE.

To the defendant, JASPER THOMASON, and MESSRS. WILLIAM T. KENDRICK and NEWLIN & ASHBURN, his attorneys:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that plaintiff will appear before the

court on Monday, April 27, 1925, at Los Angeles, California, at the opening of court, or as soon thereafter as counsel can be heard, and then and there move the court for a continuance of the hearing on said defendant's notice of special appearance and motion to quash service of subpoena, etc. Said motion will be on the ground that Joseph L. Lewinson, of counsel for plaintiff and the only counsel familiar with the facts of said case, will be engaged in the trial of a cause in one of the jury departments of the Superior Court of California in and for the County of Los Angeles, and on the further ground that said counsel's engagements have prevented him from preparing to resist the affidavits filed in support of said motion, and on the further ground that the facts stated in said affidavits are untrue insofar as they purport to impeach the return of the marshal on file herein and on the further ground that said affidavits should not be entertained by the court without the personal attendance of the makers thereof and their cross-examination.

Said motion will be based upon the records, files, decree and proceedings in said cause and the reporter's transcript of the testimony therein.

Dated at Los Angeles, California, April 25, 1925.

Wm Story, Jr
Joseph L Lewinson
Attorneys for Plaintiff.

[Endorsed]: No. D-61-J IN THE United States District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division FRANCES INVESTMENT COMPANY Plaintiff vs. FRIEND J. AUS-

TIN, ET AL Defendant NOTICE OF MOTION FOR CONTINUANCE. Receipt of a copy of the within is hereby admitted this Notice day of April 25 1925 Newlin & Ashburn Wm T Kendrick Attorneys for Jasper Thomason Time of service is shortened to one day. Dated April 25, 1925. W P James Judge FILED APR. 27, 1925 CHAS. N. WILLIAMS, Clerk By Murray E Wire LEWINSON & BARNHILL 215 West Seventh Street Los Angeles Telephone Metropolitan 0330 Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation,	IN EQUITY.
	Eq. D-61-J.
Plaintiff,	AFFIDAVIT OF JOSEPH L. LEWINSON. IN SUPPORT OF MOTION FOR CONTINUANCE.
vs	
FRIEND J. AUSTIN, et al.,	
Defendants.	

UNITED STATES OF AMERICA,)
) SS.
State of California, County of Los Angeles)

Joseph L. Lewinson being first duly sworn, on oath deposes and says:

I am one of the attorneys of record for plaintiff in said cause. The other attorney of record is William Story, Jr., who resides at Salt Lake City, Utah, and has his office at said place. Said cause has been pending in this court for upwards of seven years and I am

the only counsel for plaintiff familiar with the details thereof.

The marshal's return upon the subpoena ad respondendum directed to defendant Jasper Thomason was made on May 13, 1921 and is in words and figures following:

"UNITED STATES MARSHAL'S OFFICE)
SOUTHERN DISTRICT OF CALIFORNIA)ss.

I HEREBY CERTIFY, that I have received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason and ~~Meryle T. Davis~~ by delivery to and leaving with Miss Thomason for Jasper Thomason said defendants named therein, personally, at the County of Los Angeles in said district, a copy thereof.

C. T. WALTON
U. S. Marshal
By W. S. Walton
Deputy

Los Angeles,
May 13, 1921."

By leave of court first had and obtained, said return was amended on April 4, 1923 and, as amended, is in words and figures following:

"Amended Return
Frances Investment Co
vs. D.61
Friend J. Austin et al.

UNITED STATES MARSHAL'S OFFICE)
SOUTHERN DISTRICT OF CALIFORNIA)

I hereby certify and return, that I received the within writ on the 9th day of May, 1921, and personally

served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason, an adult person, who is a member or resident in the family of Jasper Thomason, said defendant named herein, at the County of Los Angeles, in said district, an attested copy thereof, at the dwelling house or usual place of abode of said Jasper Thomason, one of the said defendants herein.

C. T. WALTON
U. S. Marshal
By W. S. WALTON
Deputy

Los Angeles, California,
October 4, 1923."

About the time said return was amended, Meryle Thomason Davis, who is a daughter of defendant Jasper Thomason, testified that said Jasper Thomason had an adult daughter residing in his household on May 13, 1921 and prior and subsequent thereto, and said Deputy United States Marshal who signed said return and said amended return advises affiant that he had served said subpoena as in said amended return set forth.

That said cause was tried in the summer and fall of 1923 and was thereafter argued and submitted and the decree in said cause was made and entered on March 24, 1925; that by said decree, after hearing extended oral and documentary evidence, the court found that said Jasper Thomason was guilty of the gravest frauds charged against him in the amended supplemental bill of complaint.

Your affiant charges that it is clear to a moral certainty that said Jasper Thomason personally received said subpoena ad respondendum from his daughter and in that connection states: It is charged in said amended supplemental bill of complaint that one H. F. Davis and one Meryle Thomason Davis participated with said Jasper Thomason in the frauds found by the court to have been committed by said Thomason; that said H. F. Davis was up to and including the trial of said cause, a son-in-law of said Jasper Thomason, and said Meryle Thomas Davis is a daughter of said Jasper Thomason; that said Davis was a defendant in said cause and an attorney for numerous other defendants therein. Said Meryle Thomason Davis was a witness in said cause and said Jasper Thomason was subpoenaed as a witness and evaded service of such subpoena; that in order to serve such subpoena, plaintiff not only placed the same in the hands of the United States Marshal, but also procured an order for the service of the same by private persons and employed the Pinkerton National Detective Agency to serve the same. Said agency employed numerous operatives to locate said Thomason and serve said subpoena, but said Thomason evaded process; that at the time of the trial of said cause, said H. F. Davis did not appear although charged with frauds of the gravest character, and at said trial, said Meryle Thomason Davis testified that said H. F. Davis, who was her husband, was at the time in the Republic of Mexico and that said Jasper Thomason was at a place unknown and beyond the reach of communication in the mountains of Kern County.

That the facts in said case are complicated and involve numerous transactions; that in order to test the credibility of the affiant, it would take at least two days to cross-examine Jasper Thomason. Affiant verily believes said Thomason would not submit to said cross-examination for fear of contempt of court and prosecution for perjury thereof.

That affiant has not had an opportunity to examine the authorities but is of the opinion, from his experience in similar matters, that said Jasper Thomason, in addition to not speaking the truth in his affidavit, is barred by laches and also as a matter of law, said Thomason cannot impeach the marshal's return and if said return is false, it is remitted to remedy in damages against said marshal. Affiant further believes that an examination of the authorities would show that said motion to quash is a collateral attack upon the decree and should not be entertained by the court; that said motion was originally noticed for April 20, 1925 and was continued one week by stipulation of the parties at your affiant's request. At the time said request was made, your affiant was unaware that it would be necessary for him to try the jury case before referred to on April 27, 1925; that he did not have the trial date of same noted on his diary and inadvertently failed to examine his office calendars; that he had not given said jury case attention for over one year and did not have the same in mind; that if said jury case were continued, the continuance would seriously prejudice affiant's client's rights; that the rights of said Jasper Thomason will not be injuriously or at all affected if

said motion is continued for two weeks, or such other time as may be fixed by the court; that affiant has been actively engaged in emergency matters of gravity and importance since first receiving notice of said motion and has had no opportunity to prepare to meet the same.

WHEREFORE, affiant prays a continuance and a hearing on oral testimony at such time as the court may appoint.

Joseph L. Lewinson

Subscribed and sworn to before me this
25th day of April, 1925.

Cora A. Campbell

Notary Public in and for the County of Los Angeles,
State of California.

(Seal)

Endorsed: Original No. D-61-J In The United States District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division FRANCES INVESTMENT COMPANY Plaintiff vs. FRIEND J. AUSTIN, ET AL Defendant AFFIDAVIT OF JOSEPH L. LEWINSON. Receipt of a copy of the within is hereby admitted this Affidavit day of April 25 1925 Newlin & Ashburn Wm T. Kendrick Attorneys for Jasper Thomason FILED APR 27 1925 CHAS. N. WILLIAMS Clerk By Murray E Wire Deputy Clerk LEWINSON & BARNHILL 215 West Seventh Street Los Angeles Telephone Metropolitan 0330 Attorneys for Plaintiff.

At a stated term, to-wit: the January term A. D. 1925, of the District Court of the United States of America within and for the Southern Division of the Southern District of California, held at the Court room thereof in the city of Los Angeles on Monday the 27th day of April in the year of our Lord one thousand nine hundred and twenty-five;

Present:

The Honorable WM. P. JAMES, District Judge.

Frances Investment Co.,)
Plaintiff,)
vs.)No. D-61 Eq.
Friend J. Austin, et al.,)
Defendants.)

This cause coming before the Court on special appearance for hearing on motion to quash service of subpoena; J. L. Lewinsohn, Esq., appearing by Wm. A. Barnhill, Esq. in behalf of the plaintiff; attorney Ashburn, of Messrs. Newlin & Ashburn, appearing for the defendant, said Wm. A. Barnhill, Esq. files affidavit for a continuance, and Attorney Ashburn having opposed said continuance, and having filed affidavit in support of said opposition to a continuance, it is by the court ordered that the plaintiff have two days to file authorities and that this matter stand submitted.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	( ))	IN EQUITY. Eq. D-61-J.
vs.	(	AFFIDAVIT OF JOSEPH L. LEWINSON OPPOSING MOTION TO QUASH.
FRIEND J. AUSTIN, et al., Defendants.	) (	

UNITED STATES OF AMERICA (
State of California,)SS.
County of Los Angeles. (

Joseph L. Lewinson being first duly sworn, on oath deposes and says:

I am one of the attorneys of record for plaintiff in said cause. The other attorney of record is William Story, Jr., who resides at Salt Lake City, Utah, and has his office at said place. Said cause has been pending in this court for upwards of seven years and I am the only counsel for plaintiff familiar with the details thereof.

The marshal's return upon the subpoena ad respondendum directed to defendant Jasper Thomason was made on May 13, 1921 and is in words and figures following:

"UNITED STATES MARSHAL'S OFFICE)
SOUTHERN DISTRICT OF CALIFORNIA)ss.

I HEREBY CERTIFY, that I have received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason and by delivery

to and leaving with Miss Thomason for Jasper Thomason said defendants named therein, personally, at the County of Los Angeles in said district, a copy thereof,

C. T. WALTON
U. S. Marshal
By W. S. Walton
Deputy

Los Angeles,
May 13, 1921."

By leave of court first had and obtained, said return was amended on October 4, 1923 and, as amended, is in words and figures following:

UNITED STATES MARSHAL'S OFFICE)
SOUTHERN DISTRICT OF CALIFORNIA)

"Amended Return

Frances Investment Co.
vs. D. 61
Friend J. Austin et al.

I hereby certify and return, that I reveived the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason, an adult person, who is a member or resident in the family of Jasper Thomason, said defendant named herein, at the County of Los Angeles, in said district, an attested copy thereof, at the dwelling house or

usual place of abode of said Jasper Thomason, one of the said defendants herein.

C. T. WALTON
U. S. Marshal
By W. S. WALTON
Deputy

Los Angeles, California,
October 4, 1923."

That on October 4, 1923 and during the course of the trial Meryle Thomason Davis, one of the defendants, and the daughter of defendant Jasper Thomason, testified that she herself was twenty-five years old; that her oldest sister was then twenty-six years old; that her sister next younger than herself was about twenty-two years old; that she did not remember whether her oldest sister was unmarried in 1921 or not; that with the exception of her youngest sister all her sisters were attending boarding school but were at home week-ends prior to being married; that said Deputy United States Marshal who signed said return and said amended return advises affiant that he served said subpoena as in said amended return set forth.

That said cause was tried in the summer and fall of 1923 and was thereafter argued and submitted and the decree in said cause was made and entered on March 24, 1925; that by said decree after hearing extended oral and documentary evidence, the court found that said Jasper Thomason was guilty of the gravest frauds charged against him in the amended supplemental bill of complaint.

Your affiant charges that it is clear to a moral certainty that said Jasper Thomason personally received said subpoena ad respondendum from his daughter and in that connection states: It is charged in said supplemental bill of complaint that one H. F. Davis and one Meryle Thomason Davis participated with said Jasper Thomason in the frauds found by the court to have been committed by said Thomason; that said H. F. Davis was, up to and including the trial of said cause, a son-in-law of said Jasper Thomason, and said Meryle Thomason Davis is a daughter of said Jasper Thomason; that said Davis was a defendant in said cause and an attorney for numerous other defendants therein. Said Meryle Thomason Davis was a witness in said cause and said Jasper Thomason was subpoenaed as a witness and evaded service of such subpoena; that in order to serve such subpoena, plaintiff not only placed the same in the hands of the United States Marshal, but also procured an order for the service of the same by private persons and employed the Pinkerton National Detective Agency to serve the same. Said agency employed numerous operatives to locate said Thomason and serve said subpoena, but said Thomason evaded process; that at the time of the trial of said cause, said H. F. Davis did not appear although charged with frauds of the gravest character, and at said trial, said Meryle Thomason Davis testified that said H. F. Davis, who was her husband, was at the time in the Republic of Mexico and that said Jasper Thomason was somewhere in Kern County, California, at a location which no one knew, but that she, Meryle

Thomason Davis, had talked to him during the previous week.

That if upon a consideration of plaintiff's "Memorandum of Points and Authorities", filed herewith, this Honorable Court shall nevertheless be of the opinion that the return of the marshal herein may be contradicted and that the other points made by plaintiff in said memorandum are not sufficient to warrant a denial of said motion, affiant prays that this motion be set down for hearing upon oral testimony; that the facts in said case are complicated and involve numerous transactions; that by reason of defendant Jasper Thomasons' intimate personal relationship with other defendants, and by reason of the other matters and things herein averred, affiant verily believes that if said defendant Jasper Thomason and said defendant's daughter, Rosamond Thomason Hunt, are required to appear before this Honorable Court and by oral testimony support their contentions upon this motion, it will appear beyond question that this motion is not made in good faith but solely for purposes of delay, and that said defendant Jasper Thomason has been guilty of laches in prosecuting this motion, and that he had at all times knowledge of the pendency of this action and of proceedings therein taken against himself, and that he did in fact on or about May 13, 1921, receive from some member of his household the copy of the subpoena left by the marshal.

WHEREFORE, affiant prays that should this Honorable Court rule that said return of the marshal may be contradicted and that the points made by plaintiff in its said "Memorandum of Points and Authorities"

are not well taken, that this motion be set down for hearing upon oral testimony at such time as the Court may appoint.

Joseph L. Lewinson

Subscribed and sworn to before me
this 29th day of April, 1925.

Cora A. Campbell

Notary Public in and for the County of
Los Angeles, State of California.
(Seal)

[Endorsed]: No. Eq. D-61-J Dept............. In the District Court of the United States, Southern District of California, Southern Division. FRANCES INVESTMENT COMPANY, a corporation, Plaintiff vs. Friend J. Austin et al., Defendants. AFFIDAVIT OF JOSEPH L. LEWINSON OPPOSING MOTION TO QUASH FILED APR 29 1925 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk Received copy of the within affidavit this 29 day of April 1925 for Jasper Thomason. WILLIAM STORY, Jr., and Newlin & Ashbnrn Wm T. Kendrick Attorneys JOSEPH L. LEWINSON McCOMB & HALL Attorneys at Law 1014-15-16 Bank of Italy Bldg. Seventh & Olive Streets Los Angeles, Calif. Phone 821459 215 West Seventh Street Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

FRANCES INVESTMENT) IN EQUITY.
COMPANY, a corporation,) Eq. D-61-J.
Plaintiff,)
vs.) AFFIDAVIT OF
FRIEND J. AUSTIN, et al,) MERYLE THOMA-
Defendants.) SON DAVIS.

- - - - -

UNITED STATES OF AMERICA,)
State of California,) SS.
County of Los Angeles.)

MERYLE THOMASON DAVIS, being first duly sworn, on oath doth depose and say:

That she is the daughter of Jasper Thomason referred to as Meryle Thomason Davis in the affidavit of Joseph L. Lewinson, dated April 25th, 1925. That she has read the affidavit of said Lewinson. That it is not true as therein stated that affiant testified that said Jasper Thomason had an adult daughter residing in his household on May 13, 1921.

That affiant states upon her information and belief that all the testimony given on the subject of the age of Rosamond Mildred Hunt was taken down by shorthand reporter during the trial of the said action. That she has not before her the said testimony as taken down by the said reporter, nor any transcript of said testimony, nor has she seen any transcript of the testimony, but she appeals with confidence to the record as so taken in support of what she has just said. That her testimony and all the testimony given by her on the subject was given in the presence of

said Lewinson and he must know, and does know, that his statement in said affidavit of what she testified to is false, and affiant further says that whatever may be shown by the record, that it is not true that said Jasper Thomason had an adult daughter residing in his household on May 13th, 1921.

Further replying to said affidavit of said Lewinson, affiant says that it is not true that Jasper Thomason evaded service of any subpoena. It is true as shown by the record in this case that said original bill was filed in this action on the 15 day of February, 1918; that said Thomason was not made a party to the original action, but was brought into the action by supplemental bill on the 23 day of January, 1920. At that time he resided at No. 366 East Orange Grove Avenue, Pasadena, California, and continued to reside at that place until on or about the 1st day of September, 1920, and then changed his residence and resided at No. 1743 Eighth Street, Santa Monica, California, until on or about the 1st day of November, 1921, at which time he changed his residence and resided at No. 1319 11th Street, Santa Monica, California, from said last named date until on or about the 31st day of January, 1922. On the 31st day of January, 1922, he changed his residence from the last named residence to 1455 Burlingame Avenue, Brentwood Park, California. That during all the time aforesaid, up to the 26th day of August, 1923, said Thomason was continuously at his said residences respectively and could have been served with process during any of said time. That on the last named date said Jasper Thomason had important business to trans-

act in the State of Nevada for affiant, and at her request and in company with affiant drove by auto from his said home to Reno, Nevada, for the purpose of transacting that business and for no other purpose, as affiant verily believes, and was absent on said trip about six weeks and returned to his last named residence immediately thereafter, and has remained there ever since except for occasional short visits to his wife's ranch near Wineville, in Riverside County, California, and short business trips in the surrounding country.

That it is not true that the rights of said Jasper Thomason will not be injuriously affected if his motion to quash the service of process is continued for two (2) weeks. Upon the contrary, affiant states that said Thomason is suffering from a nervous breakdown and affiant is advised by his physicians that the suspense caused by the pendency of these proceedings lessens his chance for recovery, and that each day that this proceeding is pending lessens the chance of said Thomason's recovery from his present illness. In support of what affant has just said, she attaches hereunto a letter signed by and delivered by Doctor H. G. Brainerd, which letter was delivered to her at her request and made a part of this affidavit.

Further affiant saith not.

Meryle Thomason Davis

SUBSCRIBED AND SWORN TO BEFORE
ME, this 27th day of April, 1925.

Chas N. Williams, Clerk U. S. District Court
Southern District of California.
By R. S. Zimmerman Deputy

Notary Public in and for the County
of Los Angeles, State of California.
(Seal)

To Hon. Judge James.

On Apr. 10th, 1925, I examined Jasper Thomason at his home in Brentwood Park. He is 65 yrs. of age, eating poorly, constipated, sleeping but little without hypnotics. He was irritable, confused, forgetful, and depressed. I obtained a history of a previous mental upset lasting several mos. about 15 yrs. ago and never had been as well mentally since then. When I examined him he was not of sound mind and believe that compelling him to appear in court would be very detrimental to his health.

Respt. yours,

(Signed) H. G. Brainerd, M. D.

Apr. 26th, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

- - -

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	IN EQUITY. Eq. D-61-J
vs.	AFFIDAVIT OF W. S. MORTENSEN
FRIEND J. AUSTIN, et al, Defendants.	

UNITED STATES OF AMERICA,)
State of California,) SS.
County of Los Angeles.)

W. S. MORTENSEN, being duly sworn, on oath doth depose and say:

I am now and for more than twenty-one years last past have been a physician and surgeon, licensed to

practice my profession, and in active practice of medicine and surgery. That I reside at No. 7251 Motor Avenue, Palms, California, and have resided there continuously since the 1st day of June, 1909.

That I am well acquainted with Jasper Thomason, now residing at No. 1455 Burlingame Avenue, Brentwood Park, California. That I have this day examined the said Thomason and find that he is suffering from a nervous breakdown, which affects both his physical condition and his mental condition. That his condition is very serious; that he is in a highly nervous condition which affects his appetite, his digestion, and his ability to sleep, and his mentality is seriously impaired, so much so that at times he is not rational. That he is not now, and will not be, in my opinion, for some months to come able to appear in court and testify, without great danger to his life and to the impairment of his mind, nor is he now able to transact any business whatever without danger of injury both to mind and body.

That the said Thomason is not likely to be relieved of his present condition or to recover from his present affliction until some definite disposition is made of the business difficulties which now trouble his mind and affect injuriously his nervous condition.

Further affiant saith not.

W. S. Mortensen, M. D.

SUBSCRIBED AND SWORN TO BEFORE
ME THIS 26th day of April, 1925.

Charles E. Eagler
Notary Public in and for the County of
Los Angeles, State of California.
(Seal) My commission expires Oct. 9, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

- - - - -

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, vs. FRIEND J. AUSTIN, et al, Defendants.

IN EQUITY. Eq. D-61-J.

AFFIDAVIT OF ROSAMOND MILDRED HUNT.

- - - - -

UNITED STATES OF AMERICA,)
State of California,) SS.
County of Los Angeles.)

ROSAMOND MILDRED HUNT, being first duly sworn, on oath deposes and says, in addition to her affidavit made in the above entitled action dated on the 7th day of April, 1925, that the subpoena ad respondendum referred to in the affidavit of Joseph L. Lewinson on motion for continuance, which affidavit is dated April 25, 1925, was never delivered to Jasper Thomason by her, and she verily believes that said subpoena was never delivered to said Jasper Thomason at any time.

That at the time said subpoena was left at the dwelling house of said Jasper Thomason, a copy thereof was offered to this affiant. She refused to receive it and did not take it into her possession or handle it at all. That the marshal, or the person who left the said subpoena, after offering it to affiant, threw it on the floor in her presence and it remained there for some time. At the time he offered the said subpoena to affiant she was on the inside of the house and there was

a screen door between herself and said marshall. She told the marshall at that time that she was not of age, and that she had no right or disposition to receive any papers for her father, that if he wanted to serve any papers upon her father or transact any business in which he was interested that he should see her father, and that he would probably be at home soon.

Affiant further says that the said subpoena left as aforesaid disappeared before the return of her said father, Jasper Thomason, and she verily believes that the said subpoena never came into the possession of her said father at any time.

Further affiant saith not.

Rosamond Mildred Hunt

SUBSCRIBED AND SWORN TO BEFORE ME this 26th day of April, 1925.

Charles E. Eagler

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Oct. 9, 1927

(Seal.)

[Endorsed]: No. D-61-J. IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN FRANCES INVESTMENT COMPANY, Plaintiff, -vs- FRIEND J. AUSTIN, ET AL Defendants. AFFIDAVITS OF MERYLE THOMASON DAVIS, W. S. MORTENSEN AND ROSAMOND THOMASON HUNT. Receipt of a copy of the within is hereby admitted this 27th day of April, 1925. Joseph L. Lewinson & Wm Story, Jr. Attorneys for Plaintiff.

FILED APR. 27, 1925 CHAS. N. WILLIAMS, Clerk By Murray E. Wire, Deputy Clerk NEWLIN & ASHBURN WM. T. KENDRICK 935 Title Insurance Bldg., Los Angeles, California. Attorneys for defendant Jasper Thomason.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	IN EQUITY.
vs.	Eq. D-61-J
FRIEND J. AUSTIN, et al, Defendants.	AFFIDAVIT.

UNITED STATES OF AMERICA,)
State of California,)ss.
County of Los Angeles.)

MERYLE THOMASON DAVIS, being first duly sworn, deposes and says:

That since the making of her affidavit herein on the 27th day of April, 1925, she has procured access to the reporter's transcript of the evidence taken, and other proceedings had in the trial of the above-entitled action; that she has examined the transcript for the purpose of locating her testimony given at said trial on the subject of the age of her sister, Rosamond Mildred Hunt, and that she has copied from the said transcript those portions of the said record which relate to her testimony on that subject, and that the following is a true, full and correct copy of the said transcript of her said testimony on that subject, to-wit:

At Book No. 5, Page 499:

"Mr. Lewinson:

Q. You have already been sworn as a witness in this case, and testified?

A. Yes, sir.

Q. During the month of May, 1921, were where you?

A. I have no idea.

Q. I beg your pardon?

A. I have no idea.

Q. Where were you in January, 1921?

A. I likewise have no idea.

Q. You mean to tell the Court you have no idea whatever as to what community you were in, whether you were in Los Angeles, Imperial Valley or Reno, or Antelope Valley?

A. For the last six or seven years I have not been in any one place for more than one or two months at a time, consequently I cannot say.

Q. This is the year 1923.

A. Yes.

Q. Where were you last Christmas?

A. I was in Brentwood Park.

Q. I didn't hear you, Madam.

A. Last Christmas, I said, I was in Brentwood Park.

Q. In Brentwood Park?

A. Yes.

Q. Were you at the residence of your father?

A. Yes.

Q. Where were you the previous Christmas, the Christmas of 1921?

A. I think I was in Culiacan, Sinoloa, Mexico.

Q. Where were you on the 4th of July, 1921?

A. I don't remember the 4th of July.

Q. Who were the members of your father's family or household?

A. Who were the members? What do you mean?

Q. Who are now? Do you have any brothers or sisters?

A. I have three sisters, and my mother and father.

Q. Where do your three sisters live?

A. One sister lives in Santa Monica, and two sisters are living in San Pedro.

Q. You have two sisters living in San Pedro? Are all of your sisters married?

A. Yes.

Q. Were they all married during the year 1921?

A. Yes.

Q. How many of them were unmarried during the year 1921?

A. I don't know the year my oldest sister was married; I don't know whether she was unmarried in 1921 or not.

Q. When were your two younger sisters married?

A. My youngest sister was married in July this year.

Q. When was your next youngest sister married?

A. My oldest sister, I don't know, she was—I don't know whether she was married or unmarried; I don't know what year she was married.

Q. Was it one year ago or more than one year, or two?

A. It seems to me it has been two or three years.

Q. Did your unmarried sisters live at your father's household prior to being married:

A. They attended boarding school and were at home week-ends.

Q. They were home at times?

A. At week-ends.

Q. Did they both attend boarding school?

A. My youngest sister did not.

Q. Your youngest sister was at home?

A. Yes, she has been at home.

Q. She was at home up to the time of her marriage?

A. So far as I know.

Q. Well, you did know, didn't you?

A. I don't remember; I haven't been in very close touch with her for years.

Q. You do not know of any other abode that she had?

A. My sister?

Q. Yes, your youngest sister?

A. No.

Q. How old is your youngest sister now?

THE COURT: What is the purpose of all this?

MR. LEWINSON: This is very material, Your Honor. I am going to ask an amendment of the Marshal's return in order to bind the defendant Thomason personally. Release is asked against him and he is a defendant in the case.

THE COURT: Even so, what has this got to do with it?

MR. LEWINSON: I will say, Your Honor, that on the Marshal's return the Marshal makes return of having served Mrs. Thomason without stating the facts required by the statute, namely, whether the person who was served was at the dwelling house or usual place of abode of the defendant. I understand that the deputy who made this service is out of the District and the Marshal is averse to filing a supplemental return without some showing in the matter. I think it is important, not only from our standpoint, but the standpoint of the defendant Gill, that the return be amended so that full justice may be done. Under the authorities we would be entitled if the Court should so find, to judgment against Jasper Thomason, and the Court might arrange its judgment so that the defendant Gill would have some relief against the defendant Jasper Thomason—

THE COURT: You do not seem to be moving toward that with any degree of celerity. If you want to amend the special return, it seems to me that it could be done by somebody acquainted with the fact shown by the return heretofore filed.

MR. LEWINSON: The deputy who made the return is in Seattle, and is not available, and the Marshal that made the return is now out of office. We will show in connection with the case that we made repeated efforts to serve the defendant Thomason when the case was set in July and that he avoided service.

THE COURT: Can you amend a return by merely showing he has avoided service?

MR. LEWINSON: Our position is this, that service was properly made and the evidence of re-service was not properly before the Court.

THE COURT: Does this witness know anything about that?

MR. LEWINSON: She has already testified about that—that her sisters were members of her father's household. That is the first step in the proceeding.

THE COURT: All right. Go ahead.

MR. LEWINSON: Q. How old is your other sister?

A. My oldest sister is 26.

Q. How old is your other sister? Your third sister?

A. My sister younger than I, next younger than I, is, well, she must be approximately,—she is a year and a half younger than I, and I am 25, so she must be about—

Q. In the fall of 1917 were you working in your husband's office as stenographer?

. . . .

At Book 5, Page 538:

MR. MORTON: Your Honor, Mrs. Davis, asked me to ask her one or two questions regarding a matter which Mr. Lewinson took up, as to the service, or attempted service, on her father, which, with your Honor's permission, I would like to ask her. What is the name of the daughter who is shown by the return to have been served?

MR. LEWINSON: The return doesn't show which daughter it was. I will state this, the Marshal has

since amended his return so the examination this morning has no further relevancy in the case.

MR. MORTON: The witness desired to explain the matter and if the Court desires to hear it I will interrogate her.

THE COURT: Not unless the matter is of some moment.

A. Your Honor, I think my testimony this morning was misinterpreted.

THE COURT: If she wants to change her testimony or explain it, all right.

MR. MORTON: That is all I wanted, your Honor.

Q. You may explain it.

A. Mr. Lewinson was questioning me in regard to the ages of my sisters but he stopped his questioning before I had explained that my youngest sister was at this time 19 years of age and at the time of the attempted service on her was 17 years of age. He stopped his questioning and I gave the impression that my sisters were all of considerably greater years.

Q. BY MR. LEWINSON: As a matter of fact didn't you state this morning that you youngest sister was 19 years of age?

A. My youngest sister at the present time is 19 years of age.

Q. That is what you stated this morning, wasn't it?

A. Yes, sir.

Q. And you state to the Court now that service was made upon your youngest sister. How do you know service was made on your youngest sister?

A. She told me.

MR. LEWINSON: I move—well it doesn't make any difference. It cant' impeach the Marshal's return anyway. That is all."

Meryle Thomason Davis

Subscribed and sworn to before me this 30th day of April 1925.

Raymond L Haight (Seal)
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. Eq. D-61-J IN THE United States District Court, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION FRANCES INVESTMENT COMPANY, a corporation Plaintiff vs. FRIEND J. AUSTIN et al Defendants AFFIDAVIT Received copy of the within this 30th day of April 1925 Lewinson & Barnhill Attorneys for Plaintiffs Filed August 5th 1925 Chas. N. Williams Clerk R S Zimmerman Deputy Wm. T. Kendrick NEWLIN & ASHBURN 935 Title Insurance Building Telephone Main 0159 LOS ANGELES, CAL. Solicitors for Jasper Thomason Appearing Specially

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation,	)	In Equity
	)	Eq. D-61-J
v.	)	APPLICATION TO AMEND MARSHAL'S RETURN NUNC PRO TUNC.
FRIEND J. AUSTIN, et al, Defendants.	)	

Comes now the plaintiff by William Story, Jr., Esq., and Joseph L. Lewinson, Esq., its attorneys, and files the affidavit of W. S. Walton, which is filed herewith, in support of the return of the United States Marshal, dated May 11, 1921, upon the subpoena ad respondendum issued in said cause, and directed to the defendant Jasper Thomason and another or others, and the amended return upon said subpoena, dated October 4, 1923, both on file herein; and plaintiff moves the court for an order nunc pro tunc as of October 4, 1923, permitting the filing of said amended return; and plaintiff further moves the court for leave to amend the amended return upon said subpoena as of October 4, 1923, by striking out from said amended return the following: "Miss Thomason, an adult person who is a member or resident of the family of Jasper Thomason", and in lieu thereof substituting the following: "Jane Doe, whose true name is to the undersigned unknown, and who is, and on said 13th day of May, 1921, was, an adult person and a member of the family and resident in the family of said Jasper Thomason," and by striking out the word "or" after the words "the dwelling house", and in lieu thereof inserting the word "and".

In support of said motion, plaintiff shows unto the court the following:

1. Said amended return was by inadvertence and mistake filed without first procuring a formal order permitting the filing of the same.

2. That said amended return, if amended as aforesaid, will speak the true facts relative to the service of said subpoena ad respondendum upon said defendant Jasper Thomason.

3. That said order prayed for is in the interest of justice.

In support of said motion plaintiff refers to the affidavit of W. S. Walton filed herewith, and also herewith affidavit of Joseph L. Lewinson.

In support of said motions, plaintiff further refers to the statement of facts in its opening brief on final hearing on file herein, to the final decree in said cause on file herein, to the supplemental and the amended supplemental bills of complaint on file herein, and to a memorandum of authorities filed herewith.

Dated May 7, 1925.

William Story, Jr.,
Joseph L. Lewinson.
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,)
STATE OF CALIFORNIA,) SS
COUNTY OF LOS ANGELES)

JOSEPH L. LEWINSON, being by me first duly sworn, deposes and says: that he is one of the attorneys for the plaintiff in the above entitled action, and makes this affidavit for and on behalf of said

plaintiff; that he has read the foregoing APPLICATION TO AMEND MARSHAL'S RETURN NUNC PRO TUNC, and knows the contents thereof; and that the same is true of his known knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Joseph L. Lewinson.

Subscribed and sworn to before me this 7th day of May, 1925.

(Seal) Cora A. Campbell

Notary Public in and for Los Angeles County, California.

[Endorsed]: Original No. Eq D-61-J In The United States District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division FRANCES INVESTMENT COMPANY Plaintiff vs. FRIEND J. AUSTIN, ET AL Defendant APPLICATION TO AMEND MARSHAL'S RETURN Receipt of a copy of the within is hereby admitted this 7th day of May 1925 Newlin & Ashburn & Wm. T. Kendrick Attorneys for Deft Thomason FILED MAY 7 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk LEWINSON & BARNHILL 215 West Seventh Street Los Angeles Telephone Metropolitan 0330 Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

<table>
<tr><td>FRANCES INVESTMENT
COMPANY, a corporation,
Plaintiff,
v.
FRIEND J. AUSTIN, et al,
Defendants.</td><td>In equity
Eq. D-61-J
MEMORANDUM OF AUTHORITIES IN SUPPORT OF COURT'S JURISDICTION AND APPLICATION FOR ORDERS NUNC PRO TUNC</td></tr>
</table>

The return of the marshal may be supplemented and supported by his affidavit.

Mechanical Appliance Co. v. Castleman, 215 U. S. 437

Fountain v. Detroit etc. Ry Co. 210 Fed. 982 (D. C. Oh)

It is the fact of proper service and not the proof of the fact which gives the court jurisdiction. When, therefore, the facts conferring jurisdiction exist, but the record of them by way of return is defective, great liberality is allowed in permitting amended returns to be filed. Such amendment is allowed only for the purpose of supporting the judgment.

Morrissey v. Gray, 160 Cal. 390, 395

Hibernia Savings Society v. Matthai, 116 Cal. 424, 426.

Allison v. Thomas, 72 Cal. 562, 564.

Nickerson v. Warren, etc. Co. 223 Fed. 843 (D. C. Pa.)

Dougherty v. McDowell, 276 Fed. 728 (D. C. Maine.)

Such amendment will be permitted long after judgment is entered.

Jones v. Gunn, 149 Cal. 687, 692.

Such amendment may be made despite the fact that the officer who made the original return is no longer in office.

Morrissey v. Gray, 160 Cal. 390, 396 (citing numerous cases)

Jones. v. Gunn, 149 Cal. 687, 692.

In such case the old officer or his deputy must make the amendment.

32 Cyc. 539, note 60.

Such amendment may be permitted by the court upon the hearing of a motion to vacate the judgment even though no notice of such proposed amendment has previously been given to the moving party.

Herman v. Santee, 103 Cal. 519.

Dated May 7, 1925.

Respectfully submitted,

Wm Story, Jr.

Joseph L. Lewinson,

Attorneys for Plaintiff.

McComb & Hall

Of Counsel

[Endorsed]: Original No. Eq D-61-J In The United States District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division FRANCES *INVESMTNE* COMPANY Plaintiff vs. FRIEND J. AUSTIN, ET AL Defendant MEMORANDUM OF AUTHORITIES Receipt of a copy of the within is hereby admitted this 7th day of May 1925 Newlin & Ashburn & Wm. T. Kendrick At-

torneys for Deft. Thomason FILED MAY 7 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk LEWINSON & BARNHILL 215 West Seventh Street Los Angeles Telephone Metropolitan 0330 Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	)	In Equity
	)	Eq. D-61-J
v.	)	AFFIDAVIT OF
FRIEND J. AUSTIN, et al, Defendants.	)	JOSEPH L. LEWINSON

UNITED STATES OF AMERICA,)
STATE OF CALIFORNIA,) SS.
COUNTY OF LOS ANGELES.)

JOSEPH L. LEWINSON, being first duly sworn, on oath deposes and says:

My name is Joseph L. Lewinson. I am one of the attorneys for the plaintiff in the said cause. Up until last week I believed a formal order had been made in said cause on or prior to October 4, 1923, permitting the filing of the amended return of the United States Marshal upon the subpoena ad respondendum in said cause, directed to Jasper Thomason and another or others. Due to my inadvertence and mistake, such order was not so procured.

Joseph L. Lewinson

Subscribed and sworn to before me this 7th day of May, 1925.

(Seal) Cora A. Campbell
Notary Public in and for Los Angeles County, California.

[Endorsed]: Original No. Eq. D-61-J In The United States District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division FRANCES INVESTMENT COMPANY Plaintiff vs. FRIEND J. AUSTIN, ET AL, Defendant AFFIDAVIT OF JOSEPH L. LEWINSON. Receipt of a copy of the within is hereby admitted this 7th day of May 1925 Newlin & Ashburn & Wm. T. Kendrick Attorneys for Deft Thomason FILED MAY 7 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk LEWINSON & BARNHILL 215 West Seventh Street Los Angeles Telephone Metropolitan 0330 Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

FRANCES INVESTMENT)
COMPANY, a corporation,) In Equity
Plaintiff,) Eq. D-61-J
v.)
FRIEND J. AUSTIN, et al,) AFFIDAVIT OF
Defendants.) W. S. WALTON

UNITED STATES OF AMERICA,)
STATE OF CALIFORNIA,) SS.
COUNTY OF LOS ANGELES.)

W. S. WALTON, being first duly sworn, on oath deposes and says:

My name is W. S. Walton. From December, 1914, to March, 1922, I was a duly appointed, qualified and acting United States Deputy Marshal for the Southern District of California, except during a portion

of the years 1918 and 1919. During the period mentioned C. T. Walton was the duly appointed, qualified and acting United States Marshal for said district.

In May, 1921, a subpoena ad respondendum directed to Jasper Thomason and Meryle T. Davis was placed in my hands as Deputy United States Marshal, as aforesaid, for service upon said defendants; that prior to being placed in my hands said subpoena had been in the hands of three deputy United States Marshals for service, and the same had not been served; that on May 9, 1921, I proceeded to the residence of said Jasper Thomason in the City of Santa Monica, County of Los Angeles, State of California. I spent about one hour in watching said residence, being seated in an automobile in close proximity to the same. While I was so watching said house, I saw an elderly man go from the yard into the house and return three times. At the time I believed said man was the defendant, Jasper Thomason, and I still believe so. After so watching said place of residence, I rang the front door bell and a woman answered the same. I had substantially the following conversation with said woman:

She came to the door, and I asked her if this was the home of Jasper Thomason, and she said that it was. I asked her if he was home, and she said "No, he is not here. I think he is down in Imperial Valley." I said "Are you his wife?" She said, "No, I am his daughter." I said, "I have some papers to serve on Mr. Thomason, and I think I can serve them on you. You are of age, aren't you?" And she said, "I am twenty-six years old." I said, "What is your name?"

and she said, "I am a married daughter of Mr. Thomason." I said, "All right, I have a right to serve this on any adult member living in the same house. This is Mr. Thomason's home, isn't it?" She said, "Yes." She took the papers in her hand, and she said, "Just a minute. Maybe I should not take these. Maybe I am getting some papers served on my father that I should not." I said, "You can suit yourself. I have a right to serve them on any adult member in this house." She dropped them, and I went out and got in my machine.

After making said service, as aforesaid, I made return on May 13, 1921, as follows:

"UNITED STATES MARSHAL'S OFFICE)
SOUTHERN DISTRICT OF CALIFORNIA) SS

I HEREBY CERTIFY, that I have received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason and by delivery to and leaving with Miss Thomason for Jasper Thomason said defendants named therein, personally, at the County of Los Angeles in said district, a copy thereof.

C. T. WALTON
U. S. MARSHAL
By W. S. WALTON
Deputy

Los Angeles,
May 13, 1921."

Several days prior to October 4, 1923, I was in the office of Al Sittle, then the duly appointed, qualified and acting United States Marshal for the Southern District of California, and Mr. Sittle called my attention to the return in said case, saying that he had been requested by the attorneys for the plaintiff to amend the same, and asked me to meet said attorneys. Said cause was then on trial, and Mr. Sittle took me into the court room and introduced me to Mr. Joseph L. Lewinson, one of the attorneys for the plaintiff. Mr. Lewinson asked me if the subpoena had been served upon an adult person who was a member or resident in the home of said Jasper Thomason, and I stated to him that it had been. He thereupon requested Mr. Sittle, in my presence, to amend the return accordingly. Mr. Sittle replied that he was willing to amend the return, but that as the process had been served prior to his term of office, it would have to be amended in the name of his predecessor. Later, and on October 4, 1923, I returned to the office of the United States Marshal, and prepared an amended return in words and figures following:

"Amended Return
Frances Investment Co.
vs.
Friend J. Austin, et al.
UNITED STATES MARSHAL'S OFFICE)
SOUTHERN DISTRICT OF CALIFORNIA)

I hereby certify and return, that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of

May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason, an adult person, who is a member or resident in the family of Jasper Thomason, said defendant named herein, at the County of Los Angeles, in said district, an attested copy thereof, at the dwelling house or usual place of abode of said Jasper Thomason, one of the said defendants herein.

C. T. WALTON
U. S. MARSHAL
By W. S. WALTON
Deputy

Los Angeles, California,
October 4, 1923."

Said amended return was signed by me and handed to Mr. Sittle, who filed the same with the Clerk of said Court.

I know of my own knowledge that the facts stated in said return and said amended return are true, except that by inadvertence I stated the name of the person upon whom the service was made, to be Miss Thomason, when as a matter of fact service was made on one of the married daughters of said Jasper Thomason. At the time the service was made there was a small boy in the room, who, the woman with whom the copy was left, stated was her child. She also stated, referring to the abode, "This is my home."

I could without difficulty identify the person upon whom the service was made.

W. S. Walton

Subscribed and sworn to before me this 6th day of May, 1925.

Cora A Campbell

(Seal.)

Notary Public in and for Los Angeles County, State of California.

[Endorsed]: Original No. D-61-J In The United States District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division FRANCES INVESTMENT COMPANY Plaintiff vs. FRIEND J. AUSTIN, ET AL, Defendant AFFIDAVIT OF W. S. WALTON Receipt of a copy of the within is hereby admitted this 7th day of May 1925 Newlin & Ashburn & Wm. T. Kendrick Attorneys for deft Thomason FILED MAY 7, 1925 CHAS N WILLIAMS Clerk By R S Zimmerman Deputy Clerk LEWINSON & BARNHILL 215 West Seventh Street Los Angeles Telephone Metropolitan 0330 Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	IN EQUITY Eq. D-61-J
vs	MEMORANDUM IN OPPOSITION TO APPLICATION TO AMEND MARSHAL'S RETURN
FRIEND J. AUSTIN, et. al., Defendants.	

The application which is now made on behalf of plaintiff for an amended nunc pro tunc of the marshal's return of service upon the defendant Jasper Thomason contemplates the filing of a document which essentially falsifies the amended return upon which the order pro confesso was entered and the Final De-

cree rendered. The amendment does not consist merely of a correction of matters of form or of a supplementing of an otherwise imperfect statement. The proposition is to so amend the return upon which the decree was based as to show that the copy of subpoena was delivered to an entirely different person than the one named in the return, the amended return and the affidavit of W. S. Walton filed herein October 12, 1923.

That this application is one which is addressed to the sound judicial discretion of the court we take it to be free from question, and that the court will only exercise that discretion upon the making of a meritorious showing in support of the application we take it to be likewise well settled. In other words, the denial of this application would not be error on the part of the court ncr will the court, without a showing of the verity of the proposed amendment, permit its filing.

In Alderson on Judicial Writs and Process, Section 192, at page 568, the author says:

> "The matter of granting permission to an officer to amend his return is within the discretion of the court. It is not granted as of course, but is in the exercise of a sound discretion on the part of the court."

And at page 566 the same author says:

> "The court should be fully satisfied that the application to amend is made in good faith, and that the proposed amendment is warranted by the facts. It is ever the practice of the law, in the course of its application, to ascertain and enforce the truth in its judgments and proceedings; and

> to this end its courts, in their nature, have ample power, which they will exercise as far as they can, consistent with rules of just procedure and rights of parties."

The cases cited by plaintiff in support of its application do not indicate that the matter is not one resting within the judicial discretion of the court. Treating the matter from the standpoint of power of the court, the authority of those cases must be conceded; but from the standpoint of the propriety of exercise of discretion in a given instance, they are by no means controlling or even pertinent for the reason that in each of those cases the amendment was made in aid of the original return or by way of supplement thereto, while in this case the proposed amendment is an attempt to contradict and falsify the original return and substitute a new and different set of facts as a basis for the default. We apprehend that no authority can be found which is to the effect that the marshal can so amend his return as to show that the decree as rendered was rendered upon a false return, and that the present effort is one to falsify instead of supplement the return we shall later endeavor to show.

21 R. C. L., page 1329, Section 77, says:

> "Amendments of this description are not granted as a matter of right. The court is bound in every case to exercise a sound discretion, and to allow or disallow an amendment as may best tend to the furtherance of justice."

The case of Bayley, Petitioner, 132 Mass. 457, furnishes a fair rule of guidance for the exercise of dis-

cretion in such matters. In this case the officer's return showed service of a writ by leaving same at the place of abode of the defendant and he later sought to amend by inserting a statement to the effect that he had exercised reasonable diligence and been unable to make personal service. The court in denying the application, said in part:

> "Two questions are presented by these exceptions: First, Is it within the discretion of a court of record to allow an amendment to the return of a levy of an execution issued by it, by inserting a new and material fact, without proof of the truth of the fact? and second, Was there any evidence of the truth of the proposed amendment offered in the court below, upon which the court, in the exercise of a judicial discretion, could have allowed it?
>
> Upon the first question, we have no doubt. The allowance of amendments to its records is within the discretion of every court of record; but it is a judicial discretion, to be exercised under the rules of law; and a court has no authority to alter its records except to amend them so that they shall conform to the truth. It must appear that a proposed alteration is an amendment before the court can have any discretion to authorize it. * * *
>
> The second question is, whether there was any evidence of the truth of the proposed amendment, upon which the court, in the exercise of its discretion, could allow it. The ruling was, that there was nothing upon which the court could exercise

its discretion; and we think it was correct. The evidence offered of the truth of the amendment, in the first instance, was the affidavit of the petitioner; and, upon that, the amendment was allowed, without notice to any party in interest. Subsequently, the debtor applied to the court to have the order allowing the amendment annulled, and, upon a hearing, was allowed to call the petitioner, the officer who sought leave to amend his return, as a witness.

****

The affidavit of the petitioner must be taken in connection with his testimony at the hearing; and the question is, whether, upon his testimony alone, without considering the other evidence put in by the debtor, there was sufficient to justify the court, in the exercise of its discretion, in finding that the amendment was true.

****

The testimony of the petitioner shows that he did not use reasonable diligence to serve the notice. Upon hearing, at the residence of the debtor, that he was probably not in, the officer made no further inquiry or search, and no attempt to make any legal service of the notice. Upon these facts, he could not truly return that the debtor was not found within his precinct, because he had made no sufficient attempt to find him. As there was no evidence upon which the court could find that the proposed amendment conformed to the truth, it had no discretion to allow it."

In Wolcott vs Ely, 2 Allen, page 338, the court held in effect that leave would not be granted to cure formal defects in the return where the evidence showed the substantial fact involved to be falsely stated therein. In this case a person had been appointed as appraiser who was disqualified, but the officer's return showed him to be a qualified and disinterested person. Later it sought to amend the return by curing certain formal defects. The court said:

> "There is another ground which is decisive against the levy. It is undoubtedly defective, because the return does not show that due notice was given to the debtor to choose an appraiser. This is a formal defect only; and the parties have agreed, that if it was competent for the court below to allow an amendment to the return, according to the fact, such an amendment shall be taken to have been made. But we do not think it within the proper limits of judicial discretion to allow an officer to amend a formal defect in his return, when facts are untruly stated in other parts of the return; and when, if the whole return were amended to conform to the truth, the amendment would be ineffectual and useless. If any amendment is allowed, it must show the whole truth."

Hovey vs Wait, 17 Pick. 196, 199:

> "On the whole, we are very doubtful whether in fact there is any mistake in the return, as it appears upon the writ. There is no original minute of the officer, made at the time, to amend by. The amendment, if permitted, must be allowed upon doubtful inferences from questionable facts.

But the party moving for the amendment should make out the mistake beyond any reasonable doubt. It is the opinion of the whole Court, that the officer should not be permitted to amend his return, and that the judgment should be for the demandant."

The vicious nature of the present application can be best appreciated by a chronological review of the proceeding so far as the defendant Thomason is concerned.

June 10, 1921: The original alias subpoena upon "Amended Supplemental Bill of Complaint" was filed herein purporting to show service upon defendant Thomason on May 13, 1921, "by delivering to and leaving with Miss Thomason for Jasper Thomason." The deputy apparently thought that he had delivered the subpoena to Meryle Thomason Davis, for his original statement was that he had served "on Jasper Thomason and Meryle Thomason Davis", and then the words "and Meryle Thomason Davis" were stricken out before the document was filed. Attention is called to the affidavit of Rosamond Mildred Hunt, verified May 12, 1925, submitted contemporaneously herewith, which affidavit sets forth a conversation entirely at variance with the affidavit of Walton upon which plaintiff seeks to amend his return but does, on the other hand, show pretty clearly the reason that Mr. Walton, in making his original return, crossed out the name Meryle Thomason Davis and inserted the statement that the service had been made upon "Miss Thomason." He indubitably at that time concluded that the statements as made to him by Rosamond were true and he made his original return accordingly.

October 4, 1923: Mrs. Meryle Thomason Davis was examined in open court by counsel for plaintiff (see Mrs. Davis' affidavit of April 30, 1925, herein), which examination was professedly made for the purpose of establishing the facts upon which the marshal could predicate an amended return. At that examination it fairly appeared that the only daughter who was a member of defendant's family was the youngest daughter Rosamond. Counsel at that time expressly stated to the court that the purpose of the examination was to serve as a basis for the amended return; that the deputy who had made the service was out of the district and was in Seattle and, therefore, not available. On that same day, however, between the morning and afternoon session of court, there was apparently signed and filed the amended return made by the deputy marshal (who had retired from office prior to that date). The examination conducted in open court had drawn the distinction between the married and unmarried daughters, had failed to disclose that any one of them except Rosamond was a member of the defendant's household at the time of service, and the return which was filed on that day still adheres to the statement that service was made on Miss Thomason. If credence be given to the affidavit of Walton, filed herein on May 7, 1925, it appears that the conversation between him and the attorney for plaintiff was of such a casual nature that he made the return as carelessly as he makes his present affidavit (in which he swears to know of his own knowledge facts which the affidavit obviously shows are hearsay gained from another). It seems

fairly apparent that counsel and the marshal at that time relied heavily upon the proposition of law which Mr. Lewinson that day stated,—"Well, it doesn't make any difference. It can't impeach the marshal's return anyway," and that they relied upon that proposition until our brief was filed herein showing by an overwhelming weight of authorities that the return can be falsified. Until that proposition of law was established in this case counsel and the marshal cared little or nothing whether the return was true or false, because they thought all that was necessary was to make a return which was prima facie sufficient and that the matter was for all time concluded against any attack. They were advised by the testimony of Mrs. Davis given on the afternoon of October 4th that the service had been made upon her sister Rosamond and that Rosamond was a minor at the time, (See Davis affidavit of April 30, 1925.) so they went ahead with the return showing service upon the party who actually received the writ and relying upon the proposition that the marshal's statement of her age could not be at any time contradicted.

How counsel procured and filed on that day the amended return of the deputy marshal who was then in Seattle, it is difficult to fathom. But such appears to have been the case.

October 5, 1923: W. S. Walton, presumably at the instance of the attorneys for the plaintiff, undertook to supplement his amended return by his affidavit bearing that date, which was filed herein on October 12, 1923. In this affidavit he swears that he left the paper with Miss Thomason. He also swears that she was an

adult person at that time. His oath at that time was as good as his oath now. He had been advised presumably that Miss Thomason was a minor at the time of service but, nevertheless, it did not occur to him at that time to swear that he had served the paper upon a married daughter but he selected the less troublesome alternative of swearing that Miss Thomason was at the time of service an adult person. The careful consideration which Mr. Walton gives to his affidavits before making the same is illustrated by the fact that in his most recent affidavit he says that the service was made on May 9, 1921, (see page 1, line 32, of Walton affidavit filed herein May 7, 1925). This must be a mistake. But it is illustrative of the inaccuracy and recklessness of the affiant in signing affidavits and of counsel in procuring the same. It throws considerable light upon the question of whether this affidavit of Waltons should be taken at par or whether, on the contrary, the affidavits of the various members of the Thomason family which are submitted herewith should be taken as true.

In the same connection it should be observed that the latest Walton affidavit first purports to set forth what occurred between him and the person to whom he attempted to hand the paper. It is obvious from his proposed amendment to his return that he does not know to whom he delivered or attempted to deliver the document, for his proposal is to insert the words "Jane Doe whose true name is to the undersigned unknown." This is merely a confession that he is relying upon the conversation which he claims to have had

with the person who talked with him at the Thomason home, and, predicating his statement upon the allegation that that person told him she was a married daughter he seeks to uphold the judgment upon a statement of service upon a person whom he does not purport to identify, but he says by way of conclusion: "I know of my own knowledge that the facts stated in said return and said amended return are true except that by inadvertence I stated the name of the person upon whom the service was made to be Miss Thomason when as a matter of fact service was made on one of the married daughters of said Jasper Thomason." We challenge this statement as being a manifest conclusion drawn by the affiant from hearsay evidence. We further challenge it as being deliberately false because the record shows that he advisedly corrected his return to show service on Miss Thomason and then went so far as to make an affidavit to that effect, which affidavit was made after the proceedings had in open court to which we have already referred.

Not only does Mr. Walton now seek to falsify all that he did before our brief was filed herein, but he seeks to falsify what he has heretofore told counsel for plaintiff, if we are to accept the affidavits of Mr. Lewinson as true. Mr. Lewinson in his affidavit of April 25, 1925, says that the said deputy "who signed said return and said amended return advises affiant that he served said subpoena as in said amended return set forth". (See page 2, line 20.) Mr. Lewinson reiterates this statement at page 2, line 25, of his affidavit of April 29, 1925, where he says "that said Deputy

United States Marshal who signed said return and said amended return advises affiant that he served said subpoena as in said amended return set forth". This would mean but one thing,—that service was made upon Miss Thomason.

Certainly counsel, at the time that the Walton affidavit of October 5, 1923, was filed and at the time he made his own affidavits last referred to, was fully advised of the proceedings had in open court and of the fact that the service had been made on Rosamond Thomason and that she was a minor. Notwithstanding these facts, counsel at all times relied upon the proposition that the marshal could swear to what he pleased and that no one could be heard to contradict him. Never until after our brief was filed upon this motion to vacate judgment did counsel, in affidavit, brief or elsewhere, claim or so much as intimate that service had ever been made upon any person other than Rosamond Thomason.

The affidavits which we filed and served in support of the said motion showed clearly that the service, if any there was, had been made upon Rosamond Thomason and that she was a minor. Counsel were content to rest upon this statement which conformed in part to the return of the marshal because they argued as best they could and apparently believed that the return could not be disputed. Only after the contrary proposition was clearly established did they ever seek to shift their ground and find some other basis upon which to uphold the judgment.

Having decided to shift their base, they go into the bushes and shoot at us from ambush; that is to

say, they decline now to commit themselves as to the person or persons upon whom service was made but say generally that it was a married daughter whose name is unknown, and thereby seek to impose upon us the burden of proving that the service was not made upon any one of the married daughters of defendant Thomason.

This burden has been fully met, however, by the affidavits which we are filing herewith. In the first place, the affidavit of Rosamond Thomason Hunt made on April 26, 1925, shows briefly the things which occurred when the marshal was present at the house. The marshal does not purport to contradict any portion of that affidavit but merely offers a new and different story. The affidavits filed herewith show specifically that the conversation which was had by the marshal was different from what he swears to and that it was had with Rosamond; that at that time the mother was in the Antelope Valley and Jasper Thomason was with her; that they were visiting their daughter, Gladys Shupp; that Mrs. Shupp was likewise at her said residence in the Antelope Valley; that another daughter, Mrs. Stark, resided in San Pedro and was not at the home of Jasper Thomason on the day of attempted service and had no conversation with the deputy; that Meryle Thomason Davis was a married woman not a member of defendant's family, and not residing in his household; that she was at that time on a visit to her father's home but at the time of the attempted service she had gone down town and had left her two year old child with her sister Rosamond; that the child was with Rosamond at the time that the deputy was pres-

ent. This apparently accounts for the confusion of the deputy (if confusion there be) as to the identity of the person upon whom he made his service. The affidavits of all of the daughters and of the wife of Jasper Thomason are presented herewith, together with the affidavit of Emma Harris, who is an aunt of Rosamond and who knows that it was she who talked to the deputy on the occasion in question. The affidavits further show, without equivocation, that the only one of the daughters of Thomason who resided in his family or constituted a member of it at the time in question was the daughter Rosamond; that she was a minor and that it was she and no other person to whom the deputy talked on the occasion in question.

In view of the elaborate and specific showing which we have made in connection with this attempted service, contrasted as it must be in the court's mind with the evasive and uncertain position occupied by the plaintiff from time to time, the fact should be determined by the court in accordance with our showing, namely, that the service was attempted to be made upon Rosamond; that she was a minor and that, therefore, the attempted service was void.

This question of the truth of the proposed amendment and of the affidavit of Walton should be determined by the court before the motion for leave to amend is acted upon, for the reasons indicated in the quotations from the above cited authorities. There is this further reason, namely, that the amended return, when and if filed by leave of court, will constitute a prima facie official record of the truth of the facts therein stated and will of its own force and effect cast

upon the defendant Thomason the burden of proving the falsity thereof. We have already shown conclusively the falsity of the amended return now on file and it is incumbent upon the plaintiff and the marshal who now seek to make a further amendment, to convince the court that that amendment in its material aspects is true and correct. The burden at this time rests upon the plaintiff and the marshal and that burden we respectfully submit has not been sustained. The court should not under the above cited authorities, permit of such amendment unless he is satisfied of the truth of the facts contained in the proposed amendment.

The language of the court in Boyd vs Dean, 8 Sask. L. 1, is, we think, quite pertinent to this situation:

> "The plaintiff under Rule 23 (9) obtained an order giving leave to issue a writ of summons for service ex juris. The order was obtained upon affidavit alleging assets consisting of money on deposit in the Merchants Bank of Canada at Regina. The defendant moved before the Master in Chambers to set aside the proceedings on the ground that the money was held by the bank in escrow. In answer to the motion the plaintiff filed a further affidavit alleging that the defendant was the purchaser under agreement for sale of certain lands within the jurisdiction, and that the defendant had an equitable interest therein of value of $200.00 at least. The Master having dismissed the application, the defendant appealed to a Judge in Chambers."

In allowing the appeal the court said:

"The affidavit upon which the order was granted stated that the plaintiff was advised and believed that the defendant had on deposit $4,300.00 in the Merchants Bank of Canada at Regina. As this application came under section 9 of Rule 23, this was the only ground that gave the court jurisdiction. Upon this affidavit the Master ordered the issue of the writ. The defendant moved to set aside the service of the writ upon him on the ground that the above statement was not correct and he swore that the money in question did not belong to him and was held by the bank in escrow, to pay to another party on the performance of certain conditions. This ground of jurisdiction having failed, the plaintiff then set up that defendant had an equitable interest in certain real estate in the province worth more than $200.00.

That such an interest would be assets under the meaning of that rule I have no doubt, but I am of the opinion that plaintiff having got his order upon one state of facts cannot now, when he finds that they are untrue, set up another state of facts to give the court jurisdiction. He must stand or fall upon the grounds upon which the order was granted.

In Parker vs Schuller, et al. 17 T. L. R. 299, the court of appeal so held. Romer, L. J. at page 300, says:

'Moreover, in my opinion, an application for leave to issue a writ for service out of the jurisdiction ought to be made with great care and

looked at strictly. If a material representation upon which the leave was obtained in the first instance turns out to be unfounded, the plaintiff ought not to be allowed, when an application was made by the defendant to discharge the order for the issue of the writ and the service, to set up another and a distinct cause of action which was not before the Judge upon the original application."

14 California Jurisprudence, Section 116, page 1075:

"The policy of the law is to have every litigated case tried upon its merits; and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence or neglect of his adversary. The discretion of the court ought always to be exercised in conformity with the spirit of the law and in such manner as will subserve rather than defeat the ends of justice."

We take it that the authorities are fairly uniform to the effect that the court will not permit an amendment of a return of process when such amendment would prove to be nugatory. In this case an examination of the records will show that the only process which was attempted to be served upon the defendant Thomason was the subponea upon amended supplemental bill of complaint. The decree entered herein awards only a deficiency judgment against the defendant Thomason (see paragraph 8 of the decree), and an examination of the amended supplemental bill of complaint discloses that such relief was in excess

of the prayer of the complaint. That a default judgment cannot exceed the scope of the prayer of the complaint seems to be so well established as to require no citation of authority. See, however,—

Johnson vs Polhemus, 99 Cal. 244;
Webster vs Oliver Ditson Co., 171 Fed. 895;
Southern Pacific R. Co. vs Temple, 59 Fed. 17.

For all of the foregoing reasons we respectfully submit to the court that the application for leave to amend the return should be denied. But if the court should not agree with us on this we then respectfully submit that upon a consideration of all of the affidavits and other papers on file which are pertinent to this motion the court cannot fairly arrive at any other conclusion than the ultimate fact that the attempted service was made with respect to Rosamond Thomason and that she was a minor at the said time and the service, there fore, void.

Respectfully submitted,
Wm T. Kendrick
Newlin & Ashburn
Solicitors for defendant Jasper Thomason appearing specially herein.

[Endorsed]: IN EQUITY No. Eq. D-61-J In The United States District Court, in and for the SOUTHERN DISTRICT OF CALIFORNIA, Southern Division FRANCES INVESTMENT COMPANY, a corporation, Plaintiff vs. FRIEND J. AUSTIN, et al. Defendants MEMORANDUM IN OPPOSITION TO APPLICATION TO AMEND MARSHAL'S RETURN Received copy of the within memorandum

this 13th day of May 1925 Lewinson & Barnhill Attorneys for Plaintiff Filed August 5 1925 Chas N Williams Clerk R S Zimmerman Deputy NEWLIN & ASHBURN 935 Title Insurance Building Telephone Main 0159 LOS ANGELES, CAL. Solicitors for defendant Jasper Thomason appearing specially herein.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

FRANCES INVESTMENT)
)
COMPANY, a corporation,) In Equity
)
Plaintiff,) Eq. D-61-J
)
-vs-) AFFIDAVIT OF
) ROSAMOND
FRIEND J. AUSTIN, et al,) MILDRED HUNT
)
Defendants.)

UNITED STATES OF AMERICA,)
)
STATE OF CALIFORNIA,) SS.
)
COUNTY OF LOS ANGELES.)

ROSAMOND MILDRED HUNT, being first duly sworn, deposes and says:

That she is the same person who submitted affidavits herein verified respectively April 7, 1925, and April 26, 1925; and supplementing the said affidavits and replying to the affidavit of W. S. Walton filed herein on or about May 7, 1925, affiant says that her father

Jasper Thomason was not in or about his residence on the 13th day of May, 1921, and was at said time in the Antelope Valley, County of Los Angeles, California; that at the said time there was no person who resided in or constituted a part of the family of the said Jasper Thomason except affiant's mother and affiant.

That on the said last mentioned date affiant's sister, Meryle Thomason Davis, together with her son, Henry Fairfax Davis, Junior, were visiting at her father's home. That prior to the arrival of the Deputy United States Marshal on said day the said Meryle Thomason Davis had left her father's home and had left her child with affiant; that upon the arrival of the said Deputy Marshal, whom affiant believes to be the said W. S. Walton, he stated to affiant that he had a subpoena which he desired to serve upon her father Jasper Thomason and affiant stated to him that the said Jasper Thomason was not at home but was out of town; that the said Deputy Marshal then asked for Meryle Thomason Davis, and affiant told him that she was out of town also; that the said Deputy Marshal thereupon told affiant to take the said papers and hand them to her father upon his return, and affiant then said that if said Marshal had any papers to serve upon her father he could bring them back again and deliver them to him when he was at home, and the said Deputy then stated that he desired to leave the said paper with affiant, and that he could not be running down there all the time. Thereupon affiant said substantially, "Can you serve these papers upon me?" And said Deputy

said that he could serve said papers upon any adult member of Mr. Thomason's family. Then affiant said that she was only seventeen (17) years of age and asked him if he could serve the papers upon a minor, to which the said Deputy replied, "Yes, you are seventeen (17)" and sneered. He then asked affiant her name and she said "Thomason", whereupon he looked at the child of Meryle Thomason Davis who was then and there present and again smiled and asked "Miss or Mrs.", to which affiant replied "Miss Thomason." Said Deputy also asked affiant her first name and affiant's best recollection is that she told him her first name and told him correctly that it was Rosamond; meantime affiant had latched the screen door which stood between her and the said officer, who told her that she had better take the papers because if they blew away she would be in trouble. Affiant told him that she would not take the papers and if he did not want them to blow away he could put them in the mail box, but this he declined to do, saying, "I can't serve a mail box", and then threw the said paper upon the floor of the porch and left the premises.

That affiant's aunt, Emma Harris, at that time lived across the street from affiants' father's residence and affiant immediately after said Deputy had left went to her aunt's house and told her the whole of the said incident. That when affiant's sister, Meryle Thomason Davis, returned to her father's residence the said aunt was present and affiant, in the presence of the said aunt, repeated the said incident to the said Meryle Thomason Davis.

Affiant further says that there was not on the said May 13th, 1921, so far as affiant knows, any elderly man in the said residence of her father nor did any such elderly man go from the yard into the house and return three or any number of times.

Affiant, referring particularly to the said affidavit of Walton filed herein, says that she did not tell him that she thought her father was down in Imperial Valley; that the said Walton did not upon the occasion mentioned in his said affidavit say to affiant, "You are of age, aren't you?" And affiant did not say to him, "I am twenty-six years old," but on the contrary did tell him that she was only seventeen (17) years of age. That affiant did not say to the said Walton, "I am a married daughter of Mr. Thomason."

That it is not true that affiant did take the said papers or any papers in her hand, nor did she say in substance or effect, "Just a minute. Maybe I should not take these. Maybe I am getting some papers served on my father that I should not," nor did she make any portion of said alleged statement.

Affiant further says that it is not true that the said Deputy then said to her, "You can suit yourself. I have a right to serve then on any adult member in this house." Affiant further says that she did not state to the said Walton at said time or place, or at all, that the said small child who was in the room with her was her child, nor did the said Walton, so far as affiant remembers, ask or receive any information as to who was the mother of the said child.

Affiant further says that she had but one conversation or interview with the said W. S. Walton and that there was but one occasion upon which a United States Marshall or his Deputy attempted to make service upon the defendant Jasper Thomason by leaving or attempting to leave a paper with affiant, and that according to affiant's best knowledge and belief the said occasion was May 13th, 1921, and not May 9th, 1921.

Affiant further says that she was not married on or prior to said May 13th, 1921, nor at any time prior to July 19, 1923, and that her age at the time of the said attempted service was exactly as set forth in her affidavit made herein on the 7th day of April, 1925.

Rosamond Mildred Hunt

SUBSCRIBED AND SWORN TO BEFORE ME THIS 12 day of May, 1925.

CHARLES E. EAGLER

Notary Public in and for the County of Los Angeles, State of California.

(Seal)

My Commission Expires Oct. 9, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

FRANCES INVESTMENT COMPANY, a corporation,	)	In Equity
Plaintiff,	)	Eq. D-61-J
-vs-	)	AFFIDAVIT OF MERYLE THOMASON DAVIS.
FRIEND J. AUSTIN, et al,	)	
Defendants.	)	

UNITED STATES OF AMERICA,)
STATE OF CALIFORNIA,) SS.
COUNTY OF LOS ANGELES.)

MERYLE THOMASON DAVIS, being first duly sworn, deposes and says:

That affiant is one of the daughters of the defendant Jasper Thomason and Nellie M. Thomason. that on the 13th day of May, 1921, she was married and her name was Meryle Thomason Davis; that on said date she was not a member of the family of the defendant Jasper Thomason, nor was she residing in his dwelling or usual place of abode, although she was at the said time visiting at his residence.

That affiant has a child whose name is Henry Fairfax Davis, Junior, and whose age on said May 13th, 1921, was Two (2) years; that affiant was not present at the residence of the said Jasper Thomason at the

time of the attempted service of subpoena herein by the Deputy United States Marshal, but that affiant had left her said son at her father's home with her sister Rosamond Mildred Thomason (now Hunt).

That affiant at no time had with said W. S. Walton the conversation, nor any portion of the conversation, which is set forth in his affidavit filed herein on or about May 7th, 1925, and had no such conversation with him in substance or effect. That affiant did not at the time or place mentioned in the said affidavit of the said Walton tell him that Jasper Thomason was not at home or that he was down in the Imperial Valley, nor did the said Walton ask her whether she was Jasper Thomason's wife, nor did she say to him, "No, I am his daughter"; nor did the said Walton say to affiant "I have some papers to serve on Mr. Thomason, and I think I can serve them on you", or anything to that effect. Nor did he ask affiant whether she was of age, nor did she say to said Walton that she was twenty-six (26) years old, nor did he ask affiant what her name was, nor did she say to him that she was a married daughter of Mr. Thomason; nor did said Walton say to affiant that he had a right to serve the said subpoena on any adult member living in the same house, nor did he ask affiant if that was Mr. Thomason's home, nor did affiant tell him that it was; nor did affiant take said nor any papers in her hand or did she say in substance or effect, "Just a minute. Maybe I should not take these. Maybe I am getting some papers served on my father that I should not", nor did she make any part of said statements in substance or

effect; nor did the said Walton say to her, "You can suit yourself. I have a right to serve them on any adult member in this house." Nor did he make any similar statements to affiant, nor did she drop the papers or take any other part in the attempted service of the said subpoena.

That when affiant returned to her father's residence on the said May 13th, 1921, she found her child, Henry Fairfax Davis, Junior, her sister, Rosamond Mildred Thomason, and her aunt, Emma Harris, present at said place. That there was no Deputy Marshal present at that time, and that her said sister Rosamond Mildred Thomason (now Hunt) then and there told affiant about the attempt which had been that day made to serve a subpoena upon her father by endeavoring to hand the same to her, and then and there made to affiant statements with respect to the said incident which were substantially as set forth in the affidavit of Rosamond Mildred Hunt submitted herewith.

Meryle Thomason Davis

SUBSCRIBED AND SWORN TO BEFORE ME THIS 12TH DAY OF MAY, 1925.

Effie D. Botts

(Seal.)

Notary Public in and for the County of Los Angeles, State of California.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

- - - - -

FRANCES INVESMENT)
COMPANY, a corporation,) In Equity
Plaintiff,) Eq. D-61-J
-vs-) AFFIDAVIT OF
FRIEND J. AUSTIN, et al,) EMMA HARRIS
Defendants.)

- - - - -

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES.)

EMMA HARRIS, being first duly sworn, deposes and says:

That she is the wife of Albert C. Harris, who is the uncle of Rosamond Mildred Hunt, formerly Rosamond Mildred Thomason.

That on and prior to May 13th, 1921, affiant lived almost directly across the street from the residence of Jasper Thomason, defendant herein; that on the said date affiant knows that Jasper Thomason was not home, and that there was no person residing in his home except himself, his wife and his daughter Rosamond, although his daughter Meryle Thomason Davis and her small son were then visiting in his home. That on said day affiant saw a man talking to said Rosamond Mildred Thomason at the front door of Jasper Thomason's house and at the same time saw with the said Rosamond Mildred Hunt the small son of the said

Meryle Thomason Davis. That affiant could not hear the conversation between the said parties, but affiant did know that the said Meryle Thomason Davis was not at Jasper Thomason's residence at that time, and that none of his other daughters except the said Rosamond Mildred Thomason was there at the said time; that affiant saw that the said screen door was not opened during the time that the said Rosamond Mildred Thomason was conversing with the said man. That affiant saw him leave the premises but did not see what he did with the said subpoena. That immediately after the said man left the said premises the said Rosamond Mildred Thomason came over to affiant's residence and told her what had occurred between said Rosamond Mildred Thomason and the said man, with reference to his attempt to serve some papers upon Jasper Thomason, and that the statement then made to affiant by the said Rosamond Mildred Thomason was substantially the statement which is set forth in the affidavit of the said Rosamond Mildred Hunt filed contemporaneously herewith.

That shortly after said Rosamond Mildred Thomason had come to affiant's house and detailed the occurrences relating to the said attempted service, the said Meryle Thomason Davis returned to Jasper Thomason's home and the said Rosamond Mildred Thomason then and there made the same statements to the said Meryle Thomason Davis as she had previously made to affiant and substantially as set forth in

the affidavit of Rosamond Mildred Hunt submitted herewith.

Emma Harris

SUBSCRIBED AND SWORN TO BEFORE ME this 12 day of May, 1925.

H. S. Cohen

Notary Public in and for the County of Los Angeles, State of California.

(Seal)

My Commission Expires December 20, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESMENT COMPANY, a corporation, Plaintiff,	)	IN EQUITY. Eq. D-61-J.
-vs-	)	
FRIEND J. AUSTIN, et al, Defendants.	)	AFFIDAVIT OF NELLIE M. THOMASON.

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES.)

NELLIE M. THOMASON, being first duly sworn deposes and says: That she is the Nellie M. Thomason who made an affidavit herein on the 7th day of April, 1925, in support of the Motion to Vacate Judgment, etc.; that she is the wife of the defendant, Jasper Thomason; that prior to May 13, 1921, all of the daughters of the said Jasper Thomason and this affiant had been married, except the daughter, Rosamond Mildred Thomason; that on said date, the names of the three married daughters were Meryle Thomason

Davis, Verna Thomason Stark and Gladys Thomason Schupp. That on said date none of the said married daughters was a member of the family of Jasper Thomason or residing in his family or residing at the home of affiant and said Jasper Thomason, although the said Meryle Thomason Davis was at that time visiting temporarily in the said home; that on said date, affiant was in the Antelope Valley, in the County of Los Angeles, California, where she was visiting her daughter, Mrs. Schupp; said daughter was at the said time in the Antelope Valley where she then resided, and the defendant, Jasper Thomason, was likewise in the said Antelope Valley on the said date. That said Rosamond Thomason (now Hunt) was not married on or prior to May 13, 1921.

That affiant has no personal knowledge of what occurred at the time that the Deputy United States Marshal attempted to serve the subpoena herein, and that affiant herself never at any time had any conversation with W. S. Walton, nor did the whole or any portion of the purported conversation which is set forth in the affidavit of W. S. Walton filed herein, on or about May 7th, 1925, occur between the said Walton and this affiant, or in the presence of affiant. That affiant never saw the said subpoena so attempted to be served, nor did she ever know of its delivery by any person to the defendant, Jasper Thomason, but affiant verily believes that the said subpoena was not delivered to him, nor did it ever come into his possession.

Affiant further says that the physical and mental condition of the said Jasper Thomason at this time

is such that it is impossible to produce his affidavit herein; that the said Jasper Thomason is now under the care of physicians and nurses in a sanitarium.

Nellie M. Thomason

Subscribed and sworn to before me
this 13th day of May, 1925.

A. M. Anderson

(Seal)

Notary Public in and for the County
of Los Angeles, State of California.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

\- - -

FRANCES INVESMENT)
COMPANY, a corporation,) In Equity
Plaintiff,) Eq. D-61-J
-vs-) AFFIDAVIT OF
FRIEND J. AUSTIN, et al,) GLADYS THOMA-
Defendants.) SON SCHUPP

\- - - - -

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES.)

GLADYS THOMASON SCHUPP, being first duly sworn, deposes and says:

That affiant is one of the daughters of the defendant Jasper Thomason; that she was married prior to May 13th, 1921, and was on said date residing with her husband in the Antelope Valley, near Lancaster, in the County of Los Angeles, State of California; that on said date affiant was present at her said residence

in the said Antelope Valley, and that throughout the whole of the said day her father Jasper Thomason and her mother Nellie M. Thomason were at her said residence with her. That no attempt was made at said place to serve any subpoena or other paper on defendant Jasper Thomason on said day, and that no conversation such as set forth in the affidavit of W. S. Walton filed herein on or about May 7th, 1925, occurred between the said Walton and this affiant, either on the date mentioned or at the place mentioned, or on any other time or occasion, nor did any part of such conversation occur with affiant. That affiant did not at the time or place mentioned in the said affidavit of the said Walton tell him that Jasper Thomason was not at home or that he was down in the Imperial Valley, nor did the said Walton ask her whether she was Jasper Thomason's wife, nor did she say to him, "No, I am his daughter"; nor did the said Walton say to affiant "I have some papers to serve on Mr. Thomason, and I think I can serve them on you," or anything to that effect. Nor did he ask affiant whether she was of age, nor did she say to said Walton that she was twenty-six (26) years old, nor did he ask affiant what her name was, nor did she say to him that she was a married daughter of Mr. Thomason; nor did said Walton say to affiant that he had a right to serve the said subpoena on any adult member living in the same house, nor did he ask affiant if that was Mr. Thomason's home, nor did affiant tell him that it was; nor did affiant take said nor any papers in her hand nor did she say in

substance or effect, "Just a minute. Maybe I should not take these. Maybe I am getting some papers served on my father that I should not," nor did she make any part of said statements in substance or effect; nor did the said Walton say to her, "You can suit yourself. I have a right to serve them on any adult member in this house." Nor did he make any similar statements to affiant, nor did she drop the papers or take any other part in the attempted service of the said subpoena.

Gladys Thomason Schupp

SUBSCRIBED AND SWORN TO BEFORE ME this 12th day of May, 1925.

Wm. Dellamore.

Notary Public in and for the County of Los Angeles, State of California.

(Seal)

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

- - - - -

FRANCES INVESMENT COMPANY, a corporation, Plaintiff,	)	In Equity Eq. D-61-J
-vs-	)	AFFIDAVIT OF
FRIEND J. AUSTIN, et al, Defendants.	)	VERNA THOMASON STARK

- - - - -

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES.)

VERNA THOMASON STARK, being first duly sworn, deposes and says:

That she is one of the daughters of the defendant Jasper Thomason and Nellie M. Thomason, his wife; that she is the oldest daughter of said Jasper Thomason and on May 13th, 1921, was only twenty-four (24) years of age.

That affiant was married prior to May 13, 1921, and her name on said date was Verna Thomason Stark; that affiant on said date resided with her husband in San Pedro, California; that so far as she knows she was on that particular date at her said home, and affiant has no personal knowledge of the incidents which took place in connection with the attempted service of subpoena herein. Affiant does know, however, that no paper was handed to her or attempted to be handed to her by W. S. Walton or any Deputy United States Marshal, and that she never had any conversation with the said Walton either in substance or effect as set forth in his affidavit herein which was filed on or about May 7th, 1925.

That affiant did not at the time or place mentioned in the said affidavit of the said Walton tell him that Jasper Thomason was not at home or that he was down in the Imperial Valley, nor did the said Walton ask her whether she was Jasper Thomason's wife, nor did she say to him, "No, I am his daughter," nor did the said Walton say to affiant "I have some papers to serve on Mr. Thomason, and I think I can serve them on you," or anything to that effect. Nor did he ask affiant whether she was of age, nor did she say to said Walton that she was twenty-six (26) years old, nor did he ask affiant what her name was, nor did she say to him that she was a married daughter of

Mr. Thomason; nor did said Walton say to affiant that he had a right to serve the said subpoena on any adult member living in the same house, nor did he ask affiant if that was Mr. Thomason's home, nor did affiant tell him that it was; nor did affiant take said nor any papers in her hand; nor did she say in substance or effect, "Just a minute. Maybe I should not take these. Maybe I am getting some papers served on my father that I should not," nor did she make any part of said statements in substance or effect; nor did the said Walton say to her, "You can suit yourself. I have a right to serve them on any adult member in this house." Nor did he make any similar statements to affiant, nor did she drop the papers or take any other part in the attempted service of the said subpoena.

Verna Thomason tSark

SUBSCRIBED AND SWORN TO BEFORE ME this 12th day of May, 1925.

Wm. Dellamore

(Seal)

Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Original IN EQUITY No. Eq. D-61-J In the United States District Court, in and for the SOUTHERN DISTRICT OF CALIFORNIA, Southern Division FRANCES INVESTMENT COMPANY, a corporation, Plaintiff vs. FRIEND J. AUSTIN, et al, Defendants AFFIDAVITS. Received copy of the within affidavit this 13 day of May 1925 Lewinson & Barnhill Attorneys for Plaintiff

Filed Aug 5—1925 Chas. N. Williams, Clerk By R. S. Zimmerman Deputy W. T. KENDRICK NEWLIN & ASHBURN 935 Title Insurance Building Telephone Main 0159 LOS ANGELES, Cal. Solicitors for Defendant Jasper Thomason, appearing specially.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, vs. FRIEND J. AUSTIN, et al., Defendants.	D-61 Equity REPLY TO DEFENDANT THOMASON'S AFFIDAVITS IN BRIEF IN OPPOSITION TO MOTION TO AMEND RETURN NUNC PRO TUNC.

It is respectfully submitted:

1.

That the affidavit of the marshal sufficiently supports the service without the necessity of further order of court and necessitates denying said defendant's motion heretofore made to set aside the return. See Mechanical Appliance Co. v. Castleman 215 U. S. 437, and Fountain v. Detroit etc. Railway Co. 210 Fed 982 (D. C. Ohio). cited in our memo.

2.

By coming into court opposing plaintiff's motion for leave to amend the return, which motion was not made on notice and was upon an ex parte application

said defendant has waived his special appearance and submitted himself to the jurisdiction of the court. If any relief is granted to him (and he is entitled to no relief) it should be on terms.

3.

Assuming the positions taken by us in opposition to said defendants' motion to quash are unsound (which we deny), the question resolves itself into a conflict between the affidavits of the marshal and the daughters of Jasper Thomason. Judge Bledsoe, after hearing extended evidence, both oral and documentary, found Thomason and his son-in-law, Davis, as well as his daughter Meryle T. Davis, the maker of one of the affidavits, guilty of the gravest frauds, adjudging in the final decree "it is found and adjudged that said defendants H. F. Davis and Jasper Thomason, together with the defendants Friend J. Austin and Lettie M. Austin and Meryle T. Davis, committed all and singular the frauds charged against them in said bill of complaint and said judgment is not made against said Meryle T. Davis because by inadvertence and mistake she was not served with process in said cause". It also appears from the marshal's affidavit that at the said time of service, Jasper Thomason was attempting to evade service. We submit as against evidence coming from such polluted sources the court should unhesitatingly accept the affidavit of the marshal.

4.

If there is the slightest doubt in the court's mind as to the truth of the marshal's affidavit, plaintiff is entitled, as a matter of right, to have Thomason and

his daughters, who have made affidavits in his behalf, put on the stand and subjected to searching cross-examination and also to permit the marshal to identify the person with whom process was left.

5.

Now that Thomason has waived his special appearance, plaintiff is clearly entitled to the defenses of waiver and estoppal.

6.

Counsel's insinuation that Mr. Lewinson knew the facts in the marshal's affidavit prior to the time of making said affidavit is a mere speculation and is untrue. It is of the same cloth as the insinuations in a previous brief that plaintiff's counsel was the author of the amended return and filed the same as his own act. This charge, which is unworthy of defendant's counsel, is fully met in the marshal's affidavit.

Respectfully submitted.

William Story, Jr.

Joseph L. Lewinson

Attorneys for Plaintiff.

[Endorsed]: Original No. D-61 In The United States District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division Frances Investment Company, a corporation, Plaintiff vs. Friend J. Austin, et al., Defendants REPLY TO DEFENDANT THOMASON'S AFFIDAVITS IN BRIEF etc. Receipt of a copy of the within is hereby admitted this 16th day of May 1925 W. T. Kendrick and Newlin & Ashburn attorney for Defendants Filed Aug 5 1925 Chas. N. Williams, Clerk R S Zimmerman

Deputy LEWINSON & BARNHILL 215 West Seventh Street Los Angeles Telephone Metropolitan 0330 Attorneys for Plaintiff

---

At a stated term, to-wit: The January, A. D., 1925 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the twenty-fifth day of May, in the year of our Lord one thousand nine hundred and twenty-five:

Present:

The Honorable Wm. P. James, District Judge.

Frances Investment Company,)
Plaintiff,)
vs.) No. D-61-J Eq.
FRIEND J. AUSTIN, et al.,)
Defendants.)

The motion to quash service of subpoena by Jasper Thomason, appearing specially, having been presented to the court and argued by counsel for the respective parties, and submitted to the court for decision, and the court having duly considered the motion, it is by the court ordered, in accordance with the written opinion filed herein, that said motion to quash alleged service be granted, that the decree entered against said defendant be vacated and set aside, and that an exception to said ruling be noted for the plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, vs. FRIEND J. AUSTIN, ET AL, Defendants.	In Equity Eq. D-61-J ORDER RELATIVE TO FILING AFFIDAVIT OF W. S. WALTON AND AMENDMENT TO MARSHAL'S RETURN NUNC PRO TUNC.

This matter came regularly before the court on plaintiff's application for orders nunc pro tunc, plaintiff appearing by William Story, Jr., Esq., and Joseph L. Lewinson, Esq., its attorneys. The court having considered the matter, and having read the supporting affidavits filed with said application, and being fully advised in the premises,

IT IS ORDERED that the affidavit of W. S. Walton annexed to said application has been properly filed, and shall be deemed to be, and is, a part of the record in said cause.

IT IS FURTHER ORDERED, nunc pro tunc as of October 4, 1923, that leave be, and same is hereby granted, to file the amended return of the United States Marshal dated October 4, 1923, upon the subpoena ad respondendum issued in said cause and directed to the defendant Jasper Thomason and another or others as of said date; and it is further ordered, nunc pro tunc, as of October 4, 1923, that said amended return may be amended as of October 4,

1923, by striking therefrom the following: "Miss Thomason, an adult person who is a member or resident of the family of Jasper Thomason," and in lieu thereof substituting the following: "Jane Doe, whose true name is to the undersigned unknown, and who is, and on said 13th day of May, 1921, was, an adult person and a member of the family and resident in the family of said Jasper Thomason"; and further by striking out the word "or" after the words "the dwelling house" in said amended return, and in lieu thereof substituting the word "and"; and the Clerk is directed to make such amendment by proper notation and interlineation on the face of said return.

Dated May 22, 1925.

Wm P James
District Judge.

[Endorsed]: Original No. Eq. D-61-J In The United States District Court SOUTHERN DISTRICT OF CALIFORNIA Southern Division FRANCES INVESTMENT COMPANY Plaintiff vs. FRIEND J. AUSTIN, ET AL, Defendant ORDER RELATIVE TO FILING AFFIDAVIT OF W. S. WALTON, ETC. FILED JUL 15 1925 CHAS. N. WILLIAMS, Clerk By L. J. Cordes Deputy LEWINSON & BARNHILL 215 West Seventh Street Los Angeles Telephone Metropolitan 0330 Attorneys for PLAINTIFF.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

. . . .

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,
vs.
FRIEND J. AUSTIN, et al., Defendants.

No. D-61-J.

MEMORANDUM OPINION AND ORDER.

. . . .

William Story, Jr. and Joseph L. Lewinson: Attorneys for Plaintiff.

Newlin & Ashburn; Wm. T. Kendrick: Attorneys for Defendant Jasper Thomason.

. . . .

Defendant Jasper Thomason has appeared specially and moved to quash the alleged service of subpoena and to vacate a default decree. The ground of the motion is that personal service of the subpoena was not made and that no service was made upon any of the persons mentioned in Equity Rule 13. This rule provides that in lieu of personal service, service of subpoena may be made by "leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family." The affidavits presented on behalf of said defendant show that the deputy marshal attempted to make service upon a daughter of said defendant, who was at the time seventeen years of age; that the said daughter had appeared at the door of the residence and that a screen door, which stood be-

tween her and the deputy marshal, was latched; that said daughter refused to accept the "papers" and that the deputy marshal left them on the floor of the porch of the premises. The first return made by the marshal of this service recited that he had left the subpoena with "Miss Thomason for Jasper Thomason." An amended return was later prepared and filed, reciting that the deputy marshal, claiming to have made service of the subpoena, had "served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason, an adult person, who is a member or resident in the family of Jasper Thomason, * * * an attested copy thereof at the dwelling house or usual place of abode of said Jasper Thomason." Since this motion was made, an application has been presented to further amend said return by substituting for the words "Miss Thomason, an adult person who is a member or resident in the family of Jasper Thomason", the following: "Jane Doe, whose true name is to the undersigned unknown, and who is, and on said 13th day of May, 1921, was, an adult person and a member of the family and resident in the family of Jasper Thomason." This order will be signed and the supplemental affidavit of the deputy marshal in support of his return will be allowed to be filed.

Considering the application then, with all of the matters mentioned present: The point is first urged by the plaintiff that the return of the marshal cannot be attacked except in a direct action wherein the parties may have a trial upon issues of fraud, if such are framed. That undoubtedly is the rule which should

be enforced where the officer making service of the summons or subpoena definitely and certainly declares that he has made the service upon a party defendant. The rule is just as general that where any other personal service of process is allowed to be made, the mode of service must be most strictly complied with in order that the court shall have jurisdiction, and that this compliance must definitely and affirmatively appear in the return. The original return and the first amended return were definite that the service was made upon a "Miss Thomason", but the final amended return as now presented and filed shows that the officer must have been without any certain knowledge of the name of the person upon whom he made service when he filed his earlier certificate. Under such a condition of the record, I think that the case is a very proper one to allow the defendant, who admittedly never was personally served, to contest the return and show that the service as made was insufficient to give jurisdiction.

The motion to quash the alleged service of subpoena as to defendant Jasper Thomason and to vacate the decree entered against said defendant is granted. An exception is allowed in favor of the plaintiff.

Dated this 25th day of May, 1925.

Wm. P. James
District Judge.

[Endorsed]: No. D-61-J U. S. District Court, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, vs.

FRIEND J. AUSTIN, et al., Defendants. MEMORANDUM OPINION AND ORDER, FILED MAY 25 1925 CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

- - -oOo- - -

FRANCES INVESTMENT COMPANY, a corporation,	)	IN EQUITY
	(	
	)	D-61-J.
Plaintiff,	(	
v.	)	
	(	
FRIEND J. AUSTIN, LETTIE M. AUSTIN, his wife, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, his wife, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS and MERYLE T. DAVIS, his wife, JOHN W. AUSTIN and LAURA A. AUSTIN, his wife, JASPER THOMASON, JESSE BOYD FILCHER, THOMAS EDWIN GILL and MYRA RITZINGER GILL, his wife, HARRY D. ARON, T. P. SANTA, ROBERT B. WALKER, JOHN DOE, RICHARD DOE, JOHN ROE, RICHARD ROE. SARAH DOE, JANE DOE, SARAH	)(	NOTICE OF MOTION TO SET ASIDE ORDER QUASHING SERVICE OF SUBPOENA, ETC.

ROE, JANE ROE, A-1 COM-)
PANY, a corporation, B-1 (
COMPANY, a corporation, C-1)
COMPANY, a corporation, (
IMPERIAL WATER COM-)
PANY NO. 1, IMPERIAL (
WATER COMPANY NO. 3,)
IMPERIAL WATER COM- (
PANY NO. 5, WADE *H.*)
BOYER and LEAH A. (
BOYER, his wife,)
(
Defendants.)
(
..............................)

---oOo---

To Jasper Thomason, one of the defendants in the above entitled cause, and to William T. Kendrick and Newlin and Ashburn, his solicitors and attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the plaintiff will appear before the above entitled Court on Monday the 6th day of July, 1925, at the opening of court, or as soon thereafter as counsel can be heard, at the court room of the above entitled court usually occupied by the Honorable William P. James, in the Federal Building, Los Angeles, California, and will then and there make the motion hereto annexed and made a part hereof.

Dated: July 3, 1925.

William Story, Jr
Joseph L. Lewinson
Attorneys and Solicitors for Plaintiff.

Laurence W. Beilenson
Of Counsel.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

---0-0---

FRANCES INVESTMENT COMPANY, a corporation,	) (	IN EQUITY
	)	D-61-J.
Plaintiff,	(	
v.	) (	
FRIEND J. AUSTIN, LETTIE M. AUSTIN, his wife, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, his wife, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS and MERYLE T. DAVIS, his wife, JOHN W. AUSTIN and LAURA A. AUSTIN, his wife, JASPER THOMASON, JESSE BOYD FILCHER, THOMAS EDWIN GILL and MYRA RITZINGER GILL, his wife, HARRY D. ARON, T. P. SANTA, ROBERT B. WALKER, JOHN DOE, RICHARD DOE, JOHN ROE, RICHARD ROE, SARAH DOE, JANE DOE, SARAH ROE, JANE ROE, A-1 COMPANY, a corporation, B-1 COMPANY, a corporation, C-1 COMPANY, a corporation, IMPERIAL WATER COMPANY NO. 1, IMPERIAL	) ( )) ( ) ( ) ( ) ( ) ( ) ( ) ( ) ( ) ( ) ( ) (	MOTION TO SET ASIDE ORDER QUASHING SERVICE OF SUBPOENA AND SETTING ASIDE JUDGMENT AGAINST DEFENDANT JASPER THOMASON.

WATER COMPANY NO. 3,)
IMPERIAL WATER COM- (
PANY NO. 5, WADE *H.*)
BOYER and LEAH A. (
BOYER, his wife,)
(
Defendants.)
(
............................)

---0-0---

Comes now the plaintiff, by William Story, Jr., Esquire, and Joseph L. Lewinson, Esquire, its attorneys, and moves the Court for an order setting aside that certain order in the above entitled suit dated the 25th day of May, 1925, quashing the alleged service of subpoena as to the defendant, Jasper Thomason, and vacating the decree entered against said defendant, Jasper Thomason, which said order is entitled, Memorandum Opinion and Order.

In support of said motion, plaintiff shows *into* the Court the following grounds on which said motion is made:

1. That said order was erroneously made for all the reasons hereinafter set forth.

2. That defendant, Jasper Thomason, by filing affidavits and a brief in opposition to plaintiff's application and motion to amend the marshal*l*'s return nunc pro tunc, which said application and motion was dated May 7, 1925, entered a general appearance and submitted himself to the jurisdiction of the Court and waived all objections to the service or lack of service of said subpoena upon him.

3. That the amended return of the marshall was conclusive upon the defendant, Jasper Thomason.

4. That the copy of the subpoena was left with an adult person.

5. That defendant, Jasper Thomason, was in no position to urge non-compliance with Equity Rule 13.

6. That said order should not have been entered without an opportunity for an oral hearing where opportunity for cross-examination would be afforded.

7. That the attempted special appearance of the defendant, Jasper Thomason, amounted to a general appearance.

This motion will be based upon, and plaintiff refers to in support of this motion, this motion, the notice thereof, the annexed points and authorities, said order dated May 25, 1925, quashing the alleged service of subpoena as to the defendant, Jasper Thomason, and vacating the decree entered against said defendant, the minutes of this Court, the notice of the special appearance of the defendant, Jasper Thomason, and of the motion to quash service of subpoena, etc., dated the 15th day of April, 1925, and the affidavits and points and authorities annexed thereto, and filed in support thereof, the memorandum of points and authorities filed by plaintiff in opposition to the motion to quash service of subpoena, the affidavits of Joseph L. Lewinson opposing the motion to quash, the affidavit of Meryle Thomason Davis verified the 27th day of April, 1925, the affidavit of W. S. Mortenson verified April 26th, 1925, the affidavit of Rosamond Mildred Hunt verified April 26th, 1925, the affidavit of

A. W. Ashburn verified April 27th, 1925, the affidavit of Meryle Thomason Davis verified April 30th, 1925, plaintiff's memorandum of authorities in support of Court's jurisdiction and application for order nunc pro tunc, the application and motion of plaintiff to amend the marshal*l*'s return nuc pro tunc, and the affidavit of Joseph L. Lewinson verified the 7th day of May, 1925, in support thereof, the affidavit of W. S. Walton verified the 6th day of May, 1925, the order of this Court relative to filing affidavit of W. S. Walton and amendment to marshal*l*'s return nunc pro tunc dated May 7th, 1925, the memorandum of the defendant, Jasper Thomason, in opposition to the application of plaintiff to amend the marshal*l*'s return and the affidavit filed by defendant, Jasper Thomason, in opposition to said application to amend said marshal*l*'s return, the affidavit of Rosamond Mildred Hunt verified the 12th day of May, 1925, the affidavit of Meryle Thomason Davis verified the 12th day of May, 1925, the affidavit of Emma Harris verified the 12th day of May, 1925, the affidavit of Nellie M. Thomason verified the 13th day of May, 1925, the affidavit of Gladys Thomason Schupp verified the 12th day of May, 1925, the affidavit of Verna Thomason Stark verified the 12th day of May, 1825, the reply of plaintiff to defendant's, Jasper Thomason's, affidavits and brief in opposition to motion to amend return nunc pro tunc, the special appearance entered by and on behalf of Jasper Thomason, the alias subpoena on amended supplemental bill of complaint herein, the returns upon service of said subpoena made herein by W. S. Walton

dated respectively May 13, 1921, October 4, 1923, and October 5, 1923, and said return as amended in accordance with the Court's order allowing said amendment nunc pro tunc hereinbefore referred to, the order pro confesso made and entered herein on the 12th day of October, 1923, the final decree made and entered herein on the 24th day of March, 1925, and upon all of the Clerk's records and the papers and files in the above entitled proceeding which may have any relation to or bearing upon this said motion.

Dated: July 3rd, 1925.

William Story, Jr,
Joseph Lewinson
Attorneys and Solicitors for Plaintiff.

Laurence W Beilenson
Of Counsel

[Endorsed]: ORIGINAL IN EQUITY No. D-61-J In The UNITED STATES DISTRICT COURT Southern District of California Southern Division FRANCES INVESTMENT COMPANY, a corporation, Plaintiff vs. FRIEND J. AUSTIN, et al, Defendants NOTICE OF MOTION TO SET ASIDE ORDER QUASHING SERVICE OF SUBPOENA, ETC Time of service is shortened to 1 day. Dated: July 3, 1925 Wm P James Judge. FILED JUL 3 1925 CHAS. N. WILLIAMS, Clerk By L J Cordes Deputy Clerk Law Offices CHARLES GREENBERG LAURENCE W. BEILENSON 1231 C. C. Chapman Bldg. Los Angeles, Cal. TUcker 8211

At a stated term, to-wit: the January, A. D. 1925 term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court room thereof in the city of Los Angeles, on Monday, the sixth day of July in the year of our Lord one thousand nine hundred and twenty-five;

Present:

The Honorable Wm. P. James, District Judge

Frances Investment Co., a corporation,

Plaintiff,

vs.

FRIEND J. AUSTIN, et al.,

Defendants.

No. D-61-J. Eq.

This cause coming before the Court for hearing on motion to set aside order quashing service of subpoena and vacating decree as to defendant Jasper Thomason, Laurence W. Beilenson, Esq., appearing as counsel for the plaintiff; A. W. Ashburn, Esq. appearing in Court; said Laurence W. Beilenson, Esq. argues in support of motion and A. W. Ashburn, Esq. having argued to the Court in opposition thereto, and having stated that a copy of notice was left at the office of Newlin & Ashburn, and that he is not appearing for defendant Thomason but as amicus curiae and said attorney A. W. Ashburn having submitted authorities, it is by the Court ordered that Attorney Laurence W. Beilenson have two days to file brief of authorities.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	)	D-61-J
vs.	(	AFFIDAVIT OF SERVICE.
FRIEND J. AUSTIN, et al., Defendants.	)	

STATE OF CALIFORNIA)
(ss.
County of Los Angeles)

F. C. RHOADES being first duly sworn on his oath deposes and says: That he is over the age of twenty-one years and not a party to or interested in the above entitled cause; that he served the within Notice of Motion and Motion and the Points and Authorities thereto attached on William T. Kendrick, Esquire and Newlin and Ashburn, Esquires, the solicitors and attorneys for the defendant, Jasper Thomason in the above entitled cause by leaving one copy thereof with William T. Kendrick personally at his office in the Van Nuys Building in the City of Los Angeles, County of Los Angeles, State of California, at One o'clock P. M. on Friday July 3, 1925, and by leaving a copy thereof with A. W. Ashburn, Esquire, at the office

of Newlin and Ashburn in the Title Insurance Building in the City of Los Angeles, County of Los Angeles, State of California, on Friday, July 3, 1925, at 1:30 o'clock P. M.

F. C. Rhoades

Subscribed and sworn to before me this 6th day of July, 1925.

(Seal) Laurence W. Beilenson

Notary Public in and for the County of Los Angeles, State of CALIFORNIA.

Attached to affidavit are notice of motion and motion, & point & authorities in words and figures same as preceding documents.

[ENDORSED] No. D-61-J. Dept........In the DISTRICT COURT of the United States Southern District of Calif. Southern Division. FRANCES INVESTMENT COMPANY, a corporation, Plaintiff vs. FRIEND J. AUSTIN, et al Defendants AFFIDAVIT OF SERVICE Time for Service Shortened to 1 day Dated: July 3, 1925 William P James Judge Filed Jul 6 1925 CHAS. N. WILLIAMS, Clerk By L J Cordes Deputy Clerk Law offices CHARLES GREENBERG LAURENCE W. BEILENSON 1231 C. C. Chapman Bldg. Los Angeles Cal. TUcker 8211 Attorneys for Plaintiff

---

At a stated term, to wit: The January Term, A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday

the 9th day of July in the year of Our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable WM. P. JAMES, District Judge.

Frances Investment Company a corporation Plaintiff, vs. Friend J. Austin, et al, Defendants.	No. D-61-J

The motion of the plaintiff for an order setting aside the order heretofore made granting the motion of defendant Jasper Thomason to vacate the service of subpoena alleged to have been made upon him and to vacate the default decree, is denied. An exception is entered in favor of the plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

---oOo---

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, v. FRIEND J. AUSTIN, LETTIE M. AUSTIN, his wife, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, his wife, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS and MERYLE T.	IN EQUITY D-61-J. NOTICE OF PETITION FOR APPEAL

DAVIS, his wife, JOHN W. (
AUSTIN and LAURA A.)
AUSTIN, his wife, JASPER (
THOMASON, JESSE BOYD)
FILCHER, THOMAS EDWIN (
GILL and MYRA RITZINGER)
GILL, his wife, HARRY D. (
ARON, T. P. SANTA, ROB-)
ERT B. WALKER, JOHN (
DOE, RICHARD DOE, JOHN)
ROE, RICHARD ROE, (
SARAH DOE, JANE DOE,)
SARAH ROE, JANE ROE, (
A-1 COMPANY, a corporation,)
B-1 COMPANY, a corporation, (
C-1 COMPANY, a corporation,)
IMPERIAL WATER COM- (
PANY NO. 1, IMPERIAL)
WATER COMPANY NO. 3, (
IMPERIAL WATER COM-)
PANY NO. 5, WADE *H.*)
BOYER and LEAH A.)
A. BOYER, his wife, (
)
Defendants. (
)
............................(

---oOo---

To Jasper Thomason, one of the defendants in the above entitled cause, and to William T. Kendrick, Esquire, and Newlin and Ashburn, Esquires, his solicitors:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the plaintiff will appear before the above entitled court on Monday, the 20th day of July, 1925, at the opening of court, or as soon there-

after as counsel can be heard, at the court room of the above entitled court, usually occupied by Honorable William P. James, in the Federal Building, Los Angeles, California, and will then and there present its petition for appeal and its assignment of errors in the above entitled cause, copies of which are hereto annexed and served on you herewith.

Dated: July 15th, 1925.

William Story Jr
Joseph L. Lewinson
Solicitors for Plaintiff

Laurence W. Beilenson
Of Counsel.

[Endorsed]: ORIGINAL No. D-61-J In Equity Dept..... In the DISTRICT COURT OF THE UNITED STATES Southern District Southern Division FRANCES INVESTMENT COMPANY, a corporation, Plaintiff vs. FRIEND J. AUSTIN, et al., Defendants NOTICE OF PETITION FOR APPEAL Received copy of the within Notice of Petition for appeal this 15th day of July 1925 Wm. T. Kendrick & Newlin & Ashburn Solicitors for Jasper Thomason appearing specially herein for purpose of contesting jurisdiction over person of said Thomason and not appearing generally herein. FILED JUL 15 1925 CHAS. N. WILLIAMS L J Cordes Deputy Law offices CHARLES GREENBERG LAURENCE W. BEILENSON 1231 C C Chapman Bldg. Los Angeles, Cal TUcker 8211

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

---oOo---

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	IN EQUITY D-61-J.
v.	
FRIEND J. AUSTIN, LETTIE M. AUSTIN, his wife, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, his wife, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS and MERYLE T. DAVIS, his wife, JOHN W. AUSTIN and LAURA A. AUSTIN, his wife, JASPER THOMASON, JESSE BOYD FILCHER, THOMAS EDWIN GILL and MYRA RITZINGER GILL, his wife, HARRY D. ARON, T. P. SANTA, ROBERT B. WALKER, JOHN DOE, RICHARD DOE, JOHN ROE, RICHARD ROE, SARAH DOE, JANE DOE, SARAH ROE, JANE ROE, A-1 COMPANY, a corporation, B-1 COMPANY, a corporation, C-1 COMPANY, a corporation, IMPERIAL WATER COMPANY NO. 1, IMPERIAL WATER COMPANY NO. 3, IMPERIAL WATER COM-	PETITION FOR APPEAL.

PANY NO. 5, WADE *H.* (
BOYER and LEAH A.)
A. BOYER, his wife, (
)
Defendants. (
)
.............................(

---o0o---

The above named plaintiff, FRANCES INVESTMENT COMPANY, a corporation, feeling it is aggrieved by the order entered in the above entitled cause on the 25th day of May, 1925, quashing the service on defendant Jasper Thomason and setting aside the decree as to the defendant Jasper Thomason, and by the order entered in the above entitled cause on the 9th day of July, 1925, denying plaintiff's motion to set aside said order of May 25th, 1925, does hereby appeal from said orders to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that its appeal may be allowed and that citation issue as provided by law, and that a transcript of the record and proceedings and papers upon which said orders were based may be sent to the Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

Dated July 20, 1925.

William Story, Jr.
Joseph L. Lewinson
Solicitors for Plaintiff.

Laurence W. Beilenson
Of Counsel.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of Three hundred Dollars.

Dated: July 20, 1925

Wm P James
Judge.

---o0o---0---o0o---

[ENDORSED] In Equity No. D-61-J. Dept..... In The DISTRICT COURT OF THE UNITED STATES Southern District Southern Division FRANCES INVESTMENT COMPANY, a corporation, Plaintiff vs. FRIEND J. AUSTIN et al., Defendants PETITION FOR APPEAL FILED JUL 20 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk Law offices CHARLES GREENBERG LAURENCE W. BEILENSON 1231 C. C. Chapman Bldg. Los Angeles, Cal. TUcker 8211

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

---o0o---

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,) IN EQUITY

v. (D-61-J.

FRIEND J. AUSTIN, LETTIE M. AUSTIN, his wife, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, his wife, THE PEO- (ASSIGNMENT OF ERRORS.

PLES ABSTRACT & TITLE)
COMPANY, a corporation, H. (
F. DAVIS and MERYLE T.)
DAVIS, his wife, JOHN W. (
AUSTIN and LAURA A.)
AUSTIN, his wife, JASPER (
THOMASON, JESSE BOYD)
FILCHER, THOMAS EDWIN (
GILL and MYRA RITZINGER)
GILL, his wife, HARRY D. (
ARON, T. P. SANTA, ROB-)
ERT B. WALKER, JOHN (
DOE, RICHARD DOE, JOHN)
ROE, RICHARD ROE, (
SARAH DOE, JANE DOE,)
SARAH ROE, JANE ROE, (
A-1 COMPANY, a corporation,)
B-1 COMPANY, a corporation, (
C-1 COMPANY, a corporation,)
IMPERIAL WATER COM- (
PANY NO. 1, IMPERIAL)
WATER COMPANY NO. 3, (
IMPERIAL WATER COM-)
PANY NO. 5, WADE H. (
BOYER and LEAH A.)
BOYER, his wife, (
)
Defendants. (
)
..............................(

---oOo---

And now, on this the 15th day of July, 1925, comes the plaintiff by his solicitors, William Story, Jr., and Joseph L. Lewinson, and says that the order entered in the above cause on the 25th day of May, 1925, quashing the alleged service of subpoena as to defendant Jasper Thomason and vacating the decree entered against said defendant Jasper Thomason, and

the order entered in the above entitled cause on the 9th day of July, 1925, denying plaintiff's motion to set aside said order of May 25th, 1925, are erroneous and unjust to plaintiff.

1. Because the amended return of the marshal showed good and valid service on defendant Jasper Thomason.

2. Because the amended return of the marshal showed good and valid service on defendant Jasper Thomason and such return was conclusive.

3. Because the amended return of the marshal complied in all respects with Equity Rule 13 and such return, being complete and self-supporting, was conclusive.

4. Because even if the court believed that the person served was Rosamond Mildred Thomason (now Rosamond Mildred Hunt) it still appears that there was a compliance with Equity Rule 13.

5. Because it appears that Rosamond Mildred Thomason (now Rosamond Mildred Hunt) at the time the copy of the subpoena ad respondendum was left with her was an adult within the meaning of Equity Rule 13.

6. Because Equity Rule 13 must be given a reasonable construction, and if it appears that a copy of the subpoena was left with a person who understood its contents and was likely to deliver it to the person for whom it was intended, there is a compliance, and such appeared to be the facts here.

7. Because it appeared that defendant Jasper Thomason actually received the copy of the subpoena from his daughter.

8. Because it did not appear that defendant Jasper Thomason did not actually receive the copy of the subpoena from his daughter.

9. Because the defendant Jasper Thomason could not move to quash the service on him without showing that he had no knowledge of the suit until shortly before his motion to quash.

10. Because the court refused to allow oral hearing on defendant Jasper Thomason's motion to quash.

11. Because plaintiff was denied an opportunity to cross-examine the persons who made affidavits in support of defendant Jasper Thomason's motion to quash.

12. Because, in view of the deputy marshal's affidavit filed in support of the motion to amend the return, the court should have found the facts in accordance with his amended return.

13. Because, by filing a memorandum and affidavits in opposition to plaintiff's motion and application to amend the marshal's return before his motion to quash was decided, defendant Jasper Thomason made a general appearance and thereby submittted his person to the jurisdiction of the court and made the judgment against him good and valid.

14. Because, by appealing to the court's discretion in opposition to plaintiff's application to amend the marshal's return before his motion to quash was decided, defendant Jasper Thomason made a general appearance and thereby submitted his person to the jurisdiction of the court and made the judgment against him good and valid.

15. Because, by the making of an argument on the merits in opposition to plaintiff's application to amend the marshal's return before his motion to quash was decided, defendant Jasper Thomason made a general appearance and thereby submitted his person to the jurisdiction of the court and made the judgment against him good and valid.

16. Because, by making an argument based on the fact that the decree was in excess of the prayer of the amended supplemental bill of complaint in opposition to plaintiff's application to amend the marshal's return before his motion to quash was decided, defendant Jasper Thomason made a general appearance and thereby submitted his person to the jurisdiction of the court and made the judgment against him good and valid.

17. Because the court should have given no credence to the affidavits of the members of the family of defendant Jasper Thomason in view of the findings of fraud on their part in the decree.

WHEREFORE plaintiff prays that said orders be reversed and the District Court be directed to restore the decree against defendant Jasper Thomason.

William Story, Jr.
Joseph L. Lewinson
Solicitors for Plaintiff.

Laurence W. Beilenson
Of Counsel.

[Endorsed]: In Equity No. D-61-J In The DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division FRANCES INVESTMENT COMPANY a corpora-

tion, Plaintiff vs. FRIEND J. AUSTIN, et al. Defendants ASSIGNMENT OF ERRORS. Filed Jul 20 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk Law offices CHARLES GREENBERG LAURENCE W. BEILENSON 1231 C. C. Chapman Bldg. Los Angeles, Cal. TUcker 8211

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

---o0o---

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	)	IN EQUITY.
v.	(	D-61-J.
FRIEND J. AUSTIN, LETTIE M. AUSTIN, his wife, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, his wife, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS and MERYLE T. DAVIS, his wife, JOHN W. AUSTIN and LAURA A. AUSTIN, his wife, JASPER THOMASON, JESSE BOYD FILCHER, THOMAS EDWIN GILL and MYRA RITZINGER GILL, his wife, HARRY D. ARON, T. P. SANTA, ROBERT B. WALKER, JOHN DOE, RICHARD DOE, JOHN ROE, RICHARD ROE, SARAH DOE, JANE DOE,	)	

SARAH ROE, JANE ROE, (
A-1 COMPANY, a corporation,)
B-1 COMPANY, a corporation, (
C-1 COMPANY, a corporation,)
IMPERIAL WATER COM- (
PANY NO. 1, IMPERIAL)
WATER COMPANY NO. 3, (
IMPERIAL WATER COM-)
PANY NO. 5, WADE *H.* (
BOYER and LEAH A.)
A. BOYER, his wife, (
)
Defendants. (
)
............................(

---o0o---

KNOW ALL MEN BY THESE PRESENTS:

That American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, is held and firmly bound unto Jasper Thomason, appellee in the above cause, in the sum of Three Hundred Dollars ($300.00), conditioned that

WHEREAS on the 25th day of May, 1925, an order was entered in the above entitled cause quashing the service of subpoena on defendant Jasper Thomason and setting aside the decree as to defendant Jasper Thomason, and an order was entered in the above entitled cause on the 9th day of July, 1925, denying plaintiff's motion to set aside said order of May 25th, 1925, and FRANCES INVESTMENT COMPANY, a corporation, above named, having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse the said orders, and a citation having been

issued directed to the said defendant Jasper Thomason citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California, on the 19th day of August, A. D. 1925,

Now, if the said Frances Investment Company shall prosecute its appeal to effect and answer all costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and effect.

AMERICAN SURETY COMPANY OF NEW YORK

(Seal) By Louis Lombardi

RESIDENT VICE PRESIDENT

Attest: A. I. Zimmerman

RESIDENT ASSISTANT SECRETARY

Premium charged for this bond is $10/00 per annum.

State of California,
COUNTY OF LOS ANGELES } ss.:

On this 20th day of JULY A. D. 1925, before me, HELEN R. DURROW a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared LOUIS LOMBARDI personally known to me to be the Resident Vice-President and A. I. ZIMMERMAN personally known to me to be the Resident Assistant Secretary of the AMERICAN SURETY COMPANY OF NEW YORK, the Corporation described in and that executed the within instrument,

and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

Helen R. Durrow

Notary Public in and for the County of Los Angeles, State of California.

(Seal)

My Commission expires July 14, 1926

Approved July 20, 1925.

Wm P James.

Judge

[Endorsed]: In Equity D-61-J In the DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, v. FRIEND J. AUSTIN, et al, Defendants BOND FILED JUL 20 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk Law Offices CHARLES GREENBERG LAURENCE W. BEILENSON 1231 C. C. Chapman Bldg. Los Angeles, Cal. TUcker 8211

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

---oOo---

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	IN EQUITY
v.	D-61-J.
FRIEND J. AUSTIN, LETTIE M. AUSTIN, his wife, WILLIAM MARTIN BELFORD, ANNIE MARIE BELFORD, his wife, THE PEOPLES ABSTRACT & TITLE COMPANY, a corporation, H. F. DAVIS and MERYLE T. DAVIS, his wife, JOHN W. AUSTIN and LAURA A. AUSTIN, his wife, JASPER THOMASON, JESSE BOYD FILCHER, THOMAS EDWIN GILL and MYRA RITZINGER GILL, his wife, HARRY D. ARON, T. P. SANTA, ROBERT B. WALKER, JOHN DOE, RICHARD DOE, JOHN ROE, RICHARD ROE, SARAH DOE, JANE DOE, SARAH ROE, JANE ROE, A-1 COMPANY, a corporation, B-1 COMPANY, a corporation, C-1 COMPANY, a corporation, IMPERIAL WATER COMPANY NO. 1, IMPERIAL WATER COMPANY NO. 3, IMPERIAL WATER COMPANY NO. 5, WADE H.	PRAECIPE.

BOYER and LEAH A.)
A. BOYER, his wife, (
)
Defendants. (
)
..............................(

---oOo---

To the Clerk of the above entitled court:

Please incorporate the following papers and documents in the above entitled suit into the transcript on the appeal of plaintiff from the order entered in the above entitled cause on the 25th day of May, 1925, quashing the service on defendant Jasper Thomason and setting aside the decree as to defendant Jasper Thomason, and from the order entered in the above entitled cause on the 9th day of July, 1925, denying plaintiff's motion to set aside said order of May 25, 1925, the petition for said appeal and the order allowing said appeal having been filed July 20, 1925:

1. Bill in equity filed February 15, 1918.

2. The subpoena ad respondendum issued May 15, 1918, filed February 27, 1918, and the return thereon.

3. Stipulation for leave to file supplemental bill of complaint and order thereon filed December 15, 1919.

4. Supplemental bill in equity filed January 23, 1920.

5. Order for service of subpoena ad respondendum filed January 23, 1920.

6. Subpoena ad respondendum filed March 17, 1920, and return thereon.

7. Order amending supplemental complaint made February 2, 1920.

8. Motion for leave to file amended supplemental complaint filed April 3, 1920.

9. Amended supplemental bill in equity filed April 5, 1920.

10. Order of court made and entered November 15, 1920, granting plaintiff leave to amend amended supplemental bill by interlineation.

11. Alias subpoena ad respondendum to answer amended supplemental bill of complaint issued May 9, 1921, filed June 10, 1921, together with the return thereon made May 13, 1921, the further return thereon made October 4, 1923, and filed October 4, 1923, and the further return filed October 12, 1923, and the amendments thereto.

12. Order made and entered October 5, 1923, granting motion of plaintiff to amend bill of complaint.

13. Praecipe for order pro confesso against defendant Jasper Thomason filed October 12, 1923.

14. Order pro confesso against defendant Jasper Thomason entered October 12, 1923.

15. Final decree filed, entered, and recorded March 24, 1924.

16. Notice of special appearance and of motion to quash service of subpoena, and the affidavit of Jasper Thomason verified April 7, 1925, the affidavit of Rosamond Mildred Hunt verified April 7, 1925, the affidavit of Nellie M. Thomason verified April 7, 1925, which said notice and all of said affidavits were filed April 15, 1925.

17. Motion to quash service of subpoena filed April 27, 1925.

18. Notice of motion by plaintiff for a continuance filed April 27, 1925.

19. Affidavit of Joseph L. Lewinson in support of motion for a continuance filed April 27, 1925.

20. Minute order made and entered April 27, 1925, denying continuance.

21. Affidavit of Joseph L. Lewinson opposing motion to quash filed April 29, 1925.

22. Affidavit of Meryle Thomason Davis verified and filed April 27, 1925.

23. Affidavit of W. S. Mortenson verified April 26, 1925, filed April 27, 1925.

24. Affidavit of Rosamond Mildred Hunt verified April 26, 1925, filed April 27, 1925.

25. Affidavit of Meryle Thomason Davis verified April 30, 1925.

26. Application to amend marshal's return nunc pro tunc filed May 7, 1925.

27. Affidavit of Joseph L. Lewinson verified and filed May 7, 1925.

28. Affidavit of W. S. Walton verified May 6, 1925, filed May 7, 1925.

29. "Memorandum in opposition to application to amend marshal's return" receipted for by attorneys for plaintiff May 13, 1925.

30. Affidavit of Rosamond Mildred Hunt verified May 12, 1925, receipted for by attorneys for plaintiff May 13, 1925.

31. Affidavit of Meryle Thomason Davis verified May 12, 1925, receipted for by attorneys for plaintiff May 13, 1925.

32. Affidavit of Emma Harris verified May 12, 1925, receipted for by attorneys for plaintiff May 13, 1925.

34. Affidavit of Gladys Thomason Schupp verified May 12, 1925, receipted for by attorneys for plaintiff May 13, 1925.

35. Affidavit of Verna Thomason Stark verified May 12, 1925, receipted for by attorneys for plaintiff May 13, 1925.

36. Plaintiff's "Reply to defendant Thomason's affidavits in brief in opposition to motion to amend return nunc pro tunc" receipted for by attorneys for defendant Jasper Thomason on May 16, 1925.

37. Order relative to filing affidavit of W. S. Walton and amendment to marshal's return nunc pro tunc dated May 22, 1925.

38. "Memorandum opinion and order" made, entered and filed May 25, 1925.

39. Notice of motion to set aside order quashing service of subpoena, etc., filed July 3, 1925.

40. Motion to set aside order quashing service of subpoena, etc., filed July 3, 1925.

41. Minutes of court for July 6, 1925, on hearing of said motion to set aside order quashing service of subpoena, etc.

42. Affidavit of service by F. C. Rhoades verified and filed July 6, 1925.

43. Minute order denying motion to set aside order vacating service of subpoena, etc., entered July 9, 1925.

44. Notice of petition for appeal dated July 15, 1925, filed July 15, 1925.

45. Petition for appeal and order allowing appeal.
46. Assignment of errors.
47. Citation.
48. Bond.

William Story Jr
Joseph L. Lewinson
Solicitors for Plaintiff

Laurence W Beilenson
Of Counsel.

Received a copy of the within Praecipe this 20th day of July, 1925.

Wm T. Kendrick
Newlin and Ashburn
Solicitors for Defendant Jasper Thomason appearing specially herein for purpose of contesting jurisdiction over person and not appearing generally herein.

[Endorsed]: In Equity D-61-J In the DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION FRANCES INVESTMENT COMPANY, a corporation, Plaintiff v. FRIEND J. AUSTIN, et al, Defendants. PRAECIPE FILED JUL 20 1925 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk Law offices of CHARLES GREENBERG LAURENCE W. BEILENSON 1231 C. C. Chapman Bldg. Los Angeles, Cal. TUcker 8211

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISON

FRANCES INVESTMENT COMPANY, a corporation, Plaintiff,	)	No. D-61-J Eq.
vs.	)	STIPULATION
FRIEND J. AUSTIN, et al., Defendants.	)	

---o0o---

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff and the defendant Jasper Thomason, by and through their respective solicitors (the solicitors for defendant Jasper Thomason appearing specially herein for purpose of contesting jurisdiction over person and not appearing generally herein), as follows: (1) That there shall be omitted from the record and transcript on appeal of plaintiff herein, the "Reply brief of plaintiff on motion to set aside the order quashing service", filed herein on July 8, 1925, and the "Memorandum of Amici Curiae on motion to set aside order quashing service" which was served upon counsel for plaintiff on July 9, 1925, and plaintiff's "Points and Authorities" attached to and filed with Plaintiff's "Notice of motion to set aside

order quashing service of subpoena, etc." filed herein July 3, 1925.

William Story, Jr. & Joseph L. Lewinson
Solicitors for plaintiff

Laurence W. Beilenson
Of Counsel
Wm. T. Kendrick
and Newlin & Ashburn
Solicitors for defendant Jasper Thomason, appearing specially herein for purpose of contesting jurisdiction and not appearing generally herein.

[Endorsed]: D 61 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION FRANCES INVESTMENT COMPANY, a corporation, Plaintiff, vs. FRIEND J. AUSTIN, et al., Defendants. STIPULATION FILED AUG 1 1925 CHAS. N. WILLIAMS, Clerk By L J Cordes Deputy Clerk Law Offices CHARLES GREENBERG LAURENCE W. BEILENSON 1231 C. C. Chapman Bldg. Los Angeles, Cal. TUcker 8211

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DISTRICT DIVISION

FRANCES INVESTMENT COMPANY, a corporation,	)	No. D-61-J Eq.
Plaintiff,	)	PRAECIPE FOR INCLUSION OF ADDITIONAL PORTIONS OF RECORD IN TRANSCRIPT
vs	)	
FRIEND J. AUSTIN, et. al.,	)	
Defendants.	)	

TO THE CLERK OF THE ABOVE NAMED COURT:

The undersigned, appearing specially herein on behalf of the defendant Jasper Thomason, for the sole purpose of contesting the court's jurisdiction over the person of the said defendant, and not appearing generally herein, do hereby request and demand that those portions of the record in the above entitled cause which are hereinafter specified be incorporated into the transcript on appeal herein, in addition to the portions of the record specified in the praecipe heretofore filed herein by the appellant. The said additional documents which the appellee desires so incorporated into the said transcript are the following, to-wit:

1. "Praecipe for entry of special appearance", filed herein April 15, 1925.

2. "Memorandum of points and authorities in support of motion to quash service of subpoena, etc.", filed herein April 15, 1925.

3. "Affidavit of A. W. Ashburn", verified and filed herein April 27, 1925.

4. Plaintiff's "Memorandum of points and authorities in opposition to motion to quash service of subpoena, etc.", which was served upon solicitors for defendant Thomason on April 29, 1925.

5. "Reply brief on motion to quash," which was served upon solicitors for plaintiff on April 30, 1925.

6. Plaintiff's "Memorandum of authorities in support of court's jurisdiction and application for orders nunc pro tunc," which was served upon solicitors for defendant Thomason on May 7, 1925.

7. Order made herein on May 25, 1925, granting motion to quash service of summons and vacating and setting aside decree entered against defendant Thomason.

8. "Reply brief of plaintiff on motion to set aside the order quashing service", filed herein on July 8, 1925.

9. "Memorandum of Amici Curiae on motion to set aside order quashing service", which was served upon counsel for plaintiff on July 9, 1925.

Dated: July 30, 1925.

Wm. T. Kendrick and
Newlin & Ashburn,
Solicitors for defendant Jasper Thomason, appearing specially herein for purpose of contesting jurisdiction over person and not appearing generally herein.

[Endorsed]: No. D-61-J Eq. In the United States District Court, in and for the SOUTHERN DISTRICT OF CALIFORNIA, Southern Division FRANCES INVESTMENT COMPANY a corporation Plaintiff vs. FRIEND J. AUSTIN, et. al. Defendants PRAECIPE FOR INCLUSION OF ADDITIONAL PORTIONS OF RECORD IN TRANSCRIPT Received copy of the within....... this 30 day of July 1925 Laurence W. Beilenson Attorney for plff. FILED JUL 30 1925 CHAS. N. WILLIAMS, Clerk By L J Cordes Deputy Clerk NEWLIN & ASHBURN 935 Title Insurance Building Telephone Main 0150 Los Angeles, Cal. Solicitors for Jasper Thomason

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

FRANCES INVESMENT)
COMPANY, a corporation,)
Plaintiff,) CLERK'S
-vs-) CERTIFICATE.
FRIEND J. AUSTIN, et al,)
Defendants.)

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 357 pages, numbered from 1 to 357 inclusive, to be the transcript on appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the bill in equity filed February 15, 1918; citation; the subpoena ad respondendum issued May 15, 1918, filed February 27, 1918, and the return thereon; stipulation for leave to file supplemental bill of complaint and order thereon filed December 15, 1919; supplemental bill in equity filed January 23, 1920; order for service of subpoena ad respondendum filed January 23, 1920; subpoena ad respondendum filed March 17, 1920, and return thereon; order amending supplemental complaint made February 2, 1920; motion for leave to file amended supplemental complaint filed April 3, 1920; amended supplemental bill in equity filed April 5, 1920; order of court made and entered November 15, 1920, granting

plaintiff leave to amend amended supplemental bill by interlineation; alias subpoena ad respondendum to answer amended supplemental bill of complaint issued May 9, 1921, filed June 10, 1921, together with the return thereon made May 13, 1921, the further return thereon made October 4, 1923, and filed October 4, 1923, and the further return filed October 12, 1923, and the amendments thereto; order made and entered October 5, 1923, granting motion of plaintiff to amend bill of complaint; praecipe for order pro confesso against defendant Jasper Thomason filed October 12, 1923; order pro confesso against defendant Jasper Thomason entered October 12, 1923; final decree filed, entered, and recorded March 24, 1924; Praecipe for entry of special appearance, filed herein April 15, 1925; notice of special appearance and of motion to quash service of subpoena, and the affidavit of Jasper Thomason verified April 7, 1925, the affidavit of Rosamond Mildred Hunt verified April 7, 1925, the affidavit of Nellie M. Thomason verified April 7, 1925, which said notice and all of said affidavits were filed April 15, 1925; motion to quash service of subpoena filed April 27, 1925; memorandum of points and authorities in support of motion to quash service of subpoena, etc., filed herein April 15, 1925; notice of motion by plaintiff for a continuance filed April 27, 1925; affidavit of Joseph L. Lewinson in support of motion for a continuance filed April 27, 1925; affidavit of A. W. Ashburn, verified and filed herein April 27, 1925; minute order made and entered April 27, 1925, denying continuance; plaintiff's memorandum of points and au-

thorities in opposition to motion to quash service of subpoena, etc. which was served upon solicitors for defendant Thomason on April 29, 1925; affidavit of Joseph L. Lewinson opposing motion to quash filed April 29, 1925; affidavit of Meryle Thomason Davis verified and filed April 27, 1925; affidavit of W. S. Mortenson verified April 26, 1925, filed April 27, 1925; affidavit of Rosamond Mildred Hunt verified April 26, 1925, filed April 27, 1925; affidavit of Meryle Thomason Davis verified April 30, 1925; reply brief on motion to quash, which was served upon solicitors for plaintiff on April 30, 1925; application to amend marshal's return nunc pro tunc filed May 7, 1925; plaintiff's memorandum of authorities in support of court's jurisdiction and application for orders nunc pro tunc, which was served upon solicitors for defendant Thomason on May 7, 1925; affidavit of Joseph L. Lewinson verified and filed May 7, 1925; affidavit of W. S. Walton verified May 6, 1925, filed May 7, 1925; memorandum in opposition to application to amend marshal's return receipted for by attorneys for plaintiff May 13, 1925; affidavit of Rosamond Mildred Hunt verified May 12, 1925, receipted for by attorneys for plaintiff May 13, 1925; affidavit of Meryle Thomason Davis verified May 12, 1925, receipted for by attorneys for plaintiff May 13, 1925; affidavit of Emma Harris verified May 12, 1925, receipted for by attorneys for plaintiff May 13, 1925; affidavit of Gladys Thomason Schupp verified May 12, 1925, receipted for by attorneys for plaintiff May 13, 1925; affidavit of Verna Thomason Stark verified May 12, 1925, receipted for

by attorneys for plaintiff May 13, 1925; plaintiff's reply to defendant Thomason's affidavits in brief in opposition to motion to amend return nunc pro tunc, receipted for by attorneys for defendant Jasper Thomason on May 16, 1925; order relative to filing affidavit of W. S. Walton and amendment to marshal's return nunc pro tunc dated May 22, 1925; order made herein on May 25, 1925, granting motion to quash service of summons and vacating and setting aside decree entered against defendant Thomason; memorandum opinion and order made, entered and filed May 25, 1925; notice of motion to set aside order quashing service of subpoena, etc., filed July 3, 1925; motion to set aside order quashing service of subpoena, etc., filed July 3, 1925; minutes of court for July 6, 1925, on hearing of said motion to set aside order quashing service of subpoena, etc.; affidavit of service by F. C. Rhoades verified and filed July 6, 1925; reply brief of plaintiff on motion to set aside the order quashing service, filed herein on July 8, 1925; memorandum of amici curiae on motion to set aside order quashing service, which was served upon counsel for plaintiff on July 9, 1925; minute order denying motion to set aside order vacating service of subpoena, etc., entered July 9, 1925; notice of petition for appeal dated July 15, 1925, filed July 15, 1925; petition for appeal and order allowing appeal; assignment of errors; bond and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $57.00.

and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 17th day of September, in the year of Our Lord One Thousand Nine Hundred and Twenty-five, and of our Independence the One Hundred and Fiftieth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R. S. Zimmerman,
Deputy.

Pages 148 to 213 are not in chronological order.

PARKER, STONE & BAIRD CO.

4694

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frances Investment Company, a corporation,
Appellant,

vs.

Jasper Thomason,
Appellee.

BRIEF FOR APPELLANT.

Upon Appeal From the United States District Court for the Southern District of California, Southern Division.

William Story, Jr.,
Joseph L. Lewinson,
Laurence W. Beilenson,
Solicitors for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

FILED
DEC 24 1925
F. D. MONCKTON,
CLERK

INDEX.

	PAGE
Argument	41
Brief of the Argument	31
Conclusion	119
Errors Relied On	30
Statement of Facts	3

TABLE OF AUTHORITIES CITED AND DISTINGUISHED.

Angell v. Bowler, 3 R. I. 77............32, 34, 58, 70

Ann. Cas. 1914 C, 694, Note................40, 117

Balfe v. Rumsey etc. Co., 55 Colo. 97, 133 Pac. 417 ....40, 118

Barba v. People, 18 Colo. App. 16..........40, 118

Barnett v. Holyoke Mutual Fire Insurance Co., 97 Pac. 962 (Sup. Ct. of Kan.)...........41, 118

Barnes v. Western U. Teleg. Co., 120 Fed. 550.39, 117

Bestor v. Inter-County Fair, 135 Wis. 339, 115 N. W. 809 ....38, 103, 105

Blythe v. Hinckley, 84 Fed. 228 (C. C. Cal.)...... ....58, 75, 96, 97

Borough of Jeanette v. Roehme, 47 Atl. 283 (Sup. Ct. of Pa.)..........................41, 118

Boulder Colorado Sanitarium v. Vanston, 94 Pac. 945 (Sup. Ct. of N. M.)................40, 118

Bradley v. Burrhus, 135 Iowa 324............60, 80

Briggs v. Stroud, 58 Fed. 717 (C. C. E. Dist. Wis.) 39, 114

Brookings State Bank v. Federal Reserve Bank, 291 Fed. 659, (Dist. Ct. Ore.)..............39, 114

Caldwell v. Glenn, 6 Rob. (La.) 9............... 79

PAGE

4 C. J. 1334....................................38, 104

4 C. J. 1364, 1365..............................40, 117

4 C. J. 1365-1367 117

Clark-Herrin-Campbell Co. v. H. B. Claflin Co., 218 Fed. 429 (C. C. A. 5th Cir.)............39, 107

Clarkson v. Washington, 131 Pac. 935 (Sup. Ct. of Okla.) 41, 118

Cook v. Haungs, 113 Ill. App. 501...........34, 71

Cowden v. Wild Goose Mining & Trading Co., 199 Fed. 561, 565 (C. C. A. 9th Cir.).........34, 75

Crawford v. Foster, 84 Fed. 989 (C. C. A. 7th Cir.) 38, 102, 107, 112

Crowell v. Kopp, 189 Pac. 652 (N. M. Sup.)..40, 118

Cully v. Shirk, 30 N. E. 882 (Ind. Sup.)......34, 70

Edgell v. Felder, 84 Fed. 69, 70 (C. C. A. 5th Cir.) 38, 106

18 Ency. of Pleading & Practice, 963........31, 44

Equity Rule 13 ....37, 89

Everett Railway Light and Power Co. v. 7. S. 236 Fed. 806 (Dist. Ct. Wash.).............39, 114

Foster's Federal Practice, Sec. 167a............ 60

Frank Parmelee Co. v. Aetna Life Ins. Co., 166 Fed. 741 (C. C. A. 7th Cir.).............. 50

Frank P. Miller Paper Co. v. Keystone Coal Co., 119 Atl. 79 (Sup. Ct. Pa.)...............32, 56

Garvey v. Compania Metalurgica Mexicana, 222 Fed. 732, (W. D. Tex.)......................115

Genl. Inv. Co. v. Lake Shore Etc. Co., 260 U. S. 261, 67 L. Ed. 244........................113

German Ins. Co. v. Frederick, 7 C. C. A. 122, 19 U. S. App. 24, 58 Fed. 144 (C. C. A. 8th Cir.) 39, 117

PAGE

German Mutual Farmers Fire Insurance Co. v. Decker, 74 Wis. 556, 43 N. W. 500.......... ....38, 40, 102, 104, 118

Grable v. Killits, 282 Fed. 195 (C. C. A. 6th Cir.) 109

Great Lakes and St. Lawrence Transportation Co. v. Scranton Coal Co., 239 Fed. 603 (C. C. A. 7th Cir.) 38, 101, 102, 104

Gregory v. Ford, 14 Cal. 138.............34, 75, 77

Grizzard v. Brown, 2 Tex. Civ. App. 584, 22 S. W. 252 ....39, 117

Groff v. Warner, 89 N. E. 609 (Ind. App.)..34, 70

Gwynne on Sheriffs, p. 473.................32, 53

Hallowell v. Page, 24 Mo. 590...............32, 58

Harrell v. Mexico Cattle Co., 73 Tex. 612....... 79

Hawley v. State Assurance Co., 182 Cal. 111, 113 ....34, 77

Herman v. Santee, 103 Cal. 519..............31, 44

Higham v. Iowa State Travelers' Assn., 183 Fed. 845 (C. C. W. D. Mo. W. D.)............ 59

Hilton v. Thurston, 1 Abb. Prac. (N. Y.) 318.34, 77

In re Risteen, 122 Fed. 732 (Dist. Ct. Mass.).37, 95, 97

Jackson v. Lebanon Reservoir and Ditch Co.,, 171 Pac. 997 (Ariz. Sup.).................40, 118

Jinks v. American Mortgage Company, 102 Ga. 694, 695 58

Johnson Loan and Trust Co. v. Burr, 51 Pac. 916 (Ct. App. of Kan.)...................40, 118

Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935.. ....38, 102, 109, 112, 113

Jones v. Gunn, 149 Cal. 687, 692.........31, 43, 44

PAGE

Joseph v. New Albany Steam Mill Co., 53 Fed. 180 (C. C. Ind.) 32, 47, 48

Kelly v. T. L. Smith Co., 196 Fed. 466 (C. C. A. 7th Cir.) 107, 108

Kochman v. O'Neill, 202 Ill. 110............... 81

La Abra Silver Mining Co. v. U. S., 175 U. S. 423, 464, 465, 466..........................35, 83

Lively v. Pictou, 218 Fed. 401 (C. C. A. 6th Cir.) 38, 101

Locke v. Locke, 30 Atl. 422 (R. I. Sup.)......34, 70

Lowry v. Tile Mantel & Grate Assn. of Cal., 98 Fed. 817 (Cir. Ct. N. Dist. Cal.)....38, 102, 113

Martin v. Gray, 142 U. S. 236...............34, 75

Massachusetts Benefit Life Assn. v. Lohmiller, 74 Fed. 23 (C. C. A. 7th Cir.)..........34, 72, 75

Mechanical Appliance Company v. Castleman, 215 U. S. 437, 442, 443.....................53, 59

Morrissey v. Gray, 160 Cal. 390, 396.........31, 43

Morris v. Trustees, 15 Ill. 266, 270...........31, 43

Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495 (C. C. Nev.).........................39, 114

McCarthy v. McCarthy, 66 Ind. 128.........40, 118

National Metal Co. v. Greene Consolidated Co., 11 Ariz. 108 78

Nebraska Loan and Trust Co. v. Kroener, 88 N. W. 499 (Sup. Ct. of Neb.)............41, 118

Neitert v. Trentman, 104 Ind. 390, 4 N. E. 360.... ....34, 69, 70

Nelson v. Nebraska Loan and Trust Co., 87 N. W. 320 (Sup. Ct. of Neb.).................41, 118

New Albany & S. R. Co. v. Combs, 13 Ind. 490 ....39, 116

Nichols v. Nichols, 96 Ind. 433...........34, 68, 70

PAGE

Nickerson v. Warren City Tank & Boiler Co., 223 Fed. 843 (D. C. E. D. Pa.)..............32, 53

O'Connell v. Gallagher, 104 App. Div. (N. Y.) 492 81

Orinoco Co. v. Orinoco Iron Co., 296 Fed. 965, 970 (Ct. App. D. C.)..............38, 102, 113

Osborne v. Columbia Co. Farmers Alliance Corp., 38 Pac. 160, (Sup. Ct. Wash.)............ 79

Peper Automobile Co. v. American Motor Sales Co., 180 Fed. 245 (C. C. E. D. Mo. E. D.).59, 88

Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670.. ....39, 40, 117

Phoenix Insurance Co. v. Wulf, 1 Fed. 775 (C. C. Dist. of Ind.)............................37, 94

Pine Hill Coal Co. v. Gusicki, 261 Fed. 974......114

Placek v. American Life Insurance Co., 288 Fed. 987 (Dist. Ct. Wash.)..................39, 114

Preston v. Kindrick, 94 Va. 760............32, 58

Pry v. Hannibal and St. Joseph R. R. Co., 73 Mo. 123 ....40, 118

21 R. C. L. 1281...........................37, 94

Ricketts v. Bolton, 173 Ky. 739, 743, 191 S. W. 471, 473 ....38, 102, 104

Ryan v. Driscoll, 83 Ill. 415.................40, 118

Salmon Falls Mfg. Co. v. Midland Tire & R. Co., 285 Fed. 215 (C. C. A. 6th Cir.)..........112

Savings Bank of St. Paul v. Authier, 52 Minn. 98. 80

Security Loan and Trust Co. v. Boston etc. Co., 126 Cal. 418..........................40, 118

Shepherd v. Marvel, 45 N. E. 526 (Ind. App.).34, 70

Smoot v. Judd, 184 Mo. 508, 83 S. W. 48..32, 46, 54

S. P. Co. v. Arlington Heights Fruit Co., 191 Fed. 101 (C. C. A. 9th Cir.)...............107, 108

State v. Hill, 50 Ark. 458...................34, 77

PAGE

Sterling Tire Corporation v. Sullivan, 279 Fed. 336 (C. C. A. 9th Cir.) 38, 101

St. Louis etc. Co. *ex parte* Petition, 40 Ark. 141 .... 32, 34, 58, 66

St. Louis etc. Railway Co. v. McBride, 141 U. S. 127 108

Stubbs v. McGillis, 44 Colo. 138, 96 Pac. 1005, 18 L. R. A. N. S. 405 .... 38, 103, 104, 105

Sugg v. Thornton, 132 U. S. 524, 530 .... 40, 118

Sutherland v. People's Bank, 69 S. E. 341 (Sup. Ct. Va.) 32, 58

Tillman v. Davis, 28 Ga. 494 .... 32, 56

Tisdale v. Rider, 104 N. Y. S. 77 .... 40, 118

The State to Use v. O'Neill, 4 Mo. App. 221 ... 32, 58

Trimble v. Erie Electric Motor Co., 89 Fed. 51 (C. C. Pa.) 32, 53

Twin Lakes Land and Water Co. v. Dohner, 242 Fed. 599, 403, 404 (C. C. A. 6th Cir.) 38, 101, 102, 104

19 Vin. Abr. 195 .... 32, 53

Von Roy v. Blackman, Fed. Cas. No. 16997 (C. C. La.) 32, 51, 97

Wabash Western Railway v. Brow, 164 U. S. 271, 278 .... 38, 106

Webster's New International Dictionary 37, 92

Wells Fargo & Co. v. Baker Lumber Co., 107 Ark. 415, 155 S. W. 122 .... 34, 66

Wilcke v. Duross, 144 Mich. 243 81

Willett v. Blake, 134 Pac. 1109 (Sup. Ct. Okla.) 40, 118

Wilmer v. Pico. 118 Md. 543 78

Wood v. Wilbert's Sons etc., 226 U. S. 384, 57 L. Ed. 265 109

Yale v. Edgerton, 11 Minn. 271, Gil. 184 ..... 39, 116

Yanuszanbas v. Mallory S. S. Co., 232 Fed. 132 .. 114

Zobel v. Zobel, 151 Cal. 98 .... 39, 115

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frances Investment Company, a corporation,
Appellant,

vs.

Jasper Thomason,
Appellee.

BRIEF FOR APPELLANT.

Upon Appeal From the United States District Court for the Southern District of California, Southern Division.

STATEMENT OF FACTS.

May It Please the Court:

This is an appeal from two orders of the District Court for the Southern District of California, Southern Division. The first order quashed the service of subpoena on the defendant Jasper Thomason, appellee herein, and vacated the decree previously entered against said Jasper Thomason. [Tr. 320-322.] The second order refused to set aside the first order. [Tr. 333.]

This appeal is only one phase of a litigation extending over a period of seven years, and involving appellee Jasper Thomason's family, as well as himself. It arises out of a conspiracy conceived by H. F. Davis, Thomason's son-in-law and a member of the bar, to defraud appellant and appellant's assignor out of deeds of trust and mortgages held by appellant and its assignor on lands in Imperial county, California. The means chosen to effectuate the conspiracy were a fraudulent proceeding for registration of the title to the lands, aided by a false affidavit of service by Meryle Thomason Davis, H. F. Davis' wife, and Jasper Thomason's daughter. This was followed by a great number of conveyances and mortgages, in which appellee Jasper Thomason was one of the chief participants.

Appellee Jasper Thomason, H. F. Davis, and Meryle Thomason Davis were all defendants in the suit arising out of the fraudulent conspiracy. Meryle Thomason Davis was a witness at the trial. Davis fled to Mexico; Thomason was in parts unknown of Kern county, having evaded service of process as a witness.

The suit arising out of the fraud was begun on February 15, 1918. On that date Frances Investment Company, a corporation, plaintiff in the court below, appellant herein, filed its bill in equity against Friend J. Austin and others. [Tr. 4-87.] On January 23, 1920, plantiff filed its supplemental bill in equity, [Tr. 92-114], naming new defendants, among them Jasper Thomason, appellee herein, and adding new allegations. On April 5, 1920, plaintiff filed its amended supple-

mental bill in equity. [Tr. 122-148.] The details of these pleadings are not material on this appeal. It will be sufficient to state their general nature.

It was alleged that defendants Austin and wife executed promissory notes for $55,000 to Delta Land & Water Co. and a deed of trust and mortgage on lands in Imperial county, California, as security therefor. As further security the Austins assigned to Delta Land & Water Co. notes of Anna Marie Belford and of one, Carrick, secured by mortgages on Imperial county lands. Plaintiff became the holder of these notes and securities, buying them for a valuable consideration. Defendant H. F. Davis was the attorney for the Austins and Belfords. He conceived the plan of cheating plaintiff out of its security. He had the Austins and Belfords go through a fraudulent proceeding for registration of title, and by means of false affidavits of service on plaintiff and plaintiff's assignor (one of which was executed by Meryle J. Davis, H. F. Davis' wife and appellee Thomason's daughter) procured a decree registering the title in the Austins. The Austins and Belfords, together with H. F. Davis, their attorney, Meryle Davis, his wife, Jasper Thomason, her father, appellee herein, and others then conspired to dispose of the various parcels of land and conceal the proceeds. There were then many conveyances, mortgages, and reconveyances with intent to defraud plaintiff. Plaintiff by its prayers sought to reach the original security and its proceeds, and for deficiency decrees against the defendants. This is but a sketch of the

allegations of the bill, its supplement, and amendment, but sufficient we believe for the purpose of this appeal.

After a trial on the merits Judge Bledsoe made a final decree in favor of plaintiffs, fully sustaining plaintiff's allegations [Tr. 222-233], which decree among other things contained the following language:

"* * * and in that behalf it is found and adjudged that said defendants H. F. Davis and Jasper Thomason, together with the defendants Friend J. Austin and Lettie M. Austin and Meryle T. Davis committed all and singular the frauds charged against them in said bill of complaint, and said judgment is not made against said Meryle T. Davis because by inadvertence and mistake she was not served with process in said cause; and it is further ordered that said Special Master take all necessary and proper steps to fix the amount due under the terms hereof from said Jasper Thomason and H. F. Davis." [Tr. 228.]

It is with the service on Jasper Thomason, on which said decree was based as to him, that this appeal is concerned.

Thomason was served on May 13, 1921, bv leaving a copy of the subpoena at his dwelling house with his daughter under Equity Rule 13. Although he nowhere denies full knowledge of the pendency of the suit, and although the record shows clearly that he must have known all about the suit, which was tried in October, 1923, he stood by and did nothing until April 15, 1925, when he appeared specially and moved to quash the service on him and to set aside the decree against him, because his daughter when served

was only seventeen years and four months old, and, as he claimed, was therefore not an "adult person" within the meaning of Equity Rule 13. Plaintiff contended that on a fair construction of Equity Rule 13 "adult person" meant "matured person," and that even if it did not, that the daughter served was of age, the one served being the married daughter, who was twenty-six. If the court was in doubt as to the facts, plaintiff asked an oral hearing. Moreover, plaintiff contended the marshal's return was conclusive, since it was complete and self-supporting on its face with territorial jurisdiction admitted; and that this was clearly so in view of the fact that Thomason was guilty of laches and was not seeking to defend but to defeat the jurisdiction of the court.

The deputy marshal's return had shown service on "Miss Thomason". He made affidavit that this was by inadvertence, and that he had served the married daughter of defendant, who, it is admitted, was twenty-six years of age at the time. Plaintiff made a motion to amend the return *nunc pro tunc* to speak the facts, which was granted. Defendant opposed the motion by a brief, appealing to the discretion of the court and making an argument on the merits, as well as by affidavits as to the facts. Plaintiff contended this was a general appearance and cured any defects in the service.

We pass now to a more detailed consideration of some of the matters of fact.

On May 9, 1921, a subpoena issued commanding Jasper Thomason and Meryle T. Davis to answer the

amended supplemental bill of complaint. [Tr. 215, 216.]

On May 13, 1921, W. S. Walton, deputy United States marshal, made return of said subpoena as follows:

"United States Marshal's Office,) ss:
Southern District of California.)

"I hereby certify, that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13 day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason for Jasper Thomason said defendant named therein, personally, at the county of Los Angeles in said district, a copy thereof.

Los Angeles, May 13th, 1921.

C. T. WALTON,
U. S. Marshal.
By W. S. WALTON,
Deputy."

[Tr. 218.]

On October 4, 1923, said W. S. Walton made an amended return of said subpoena as follows:

"Amended Return.) United States Marshal's
Frances Invest. Co.) Office,
vs. D 61) Southern District of Cali-
Friend J. Austin, et al.) fornia.

"I hereby certify and return, that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason, an adult person, who is a member or resident in the family of Jasper Thomason said de-

fendant named therein, at the..........county of Los Angeles in said district, an attested copy thereof, at the dwelling house or usual place of abode of said Jasper Thomason, one of said defendants herein.

C. T. WALTON,
~~A. C. Sittel,~~ *U. S. Marshal.*
By W. S. WALTON, *Deputy.*"

[Tr. fly-leaf 217.]

On October 5, 1923, W. S. Walton made an affidavit in support of his return of October 4, 1923, as follows:

"State of California, }
County of Los Angeles. } ss.

"W. S. Walton, being first duly sworn, deposes and says: I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering and leaving with Miss Thomason, an adult person who was then a member or resident in the family of Jasper Thomason, said defendant named therein, at the county of Los Angeles, state of California, an attested copy thereof, at the dwelling house or usual place of abode of said Jasper Thomason, one of said defendants herein. At said times above mentioned I was a duly qualified and acting Deputy United States Marshal*l* for the Southern District of California.

W. S. WALTON.

Subscribed and sworn to before me this 5th day of October, 1923.

(Seal) CHAS. N. WILLIAMS,
Clerk U. S. District Court, Southern District of California.
By R. S. ZIMMERMAN, *Deputy.*"

[Tr. 217.]

On October 12. 1923, an order *pro confesso* was taken against Jasper Thomason. [Tr. 221.]

Thereafter, and after proper application and order, which will be stated at length presently, the return was amended on May 22, 1925, *nunc pro tunc,* as follows:

"Amended Return.) United States Marshal's
Frances Invest Co.) Office,
vs. D-61) Southern District of Cali-
Friend J. Austin, et al.) fornia.

"I hereby certify and return that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Jane Doe, whose true name is to the undersigned unknown and who is and on said 13th dav of May, 1921, was an adult person and a member of the family and resident in the family of Jasper Thomason said defendant named therein, at the countv of Los Angeles, in said district, an attested copy thereof, at the dwelling house and usual place of abode of said Jasper Thomason, one of said defendants herein.

C. T. Walton,
~~A. C. Sittel,~~ *U. S. Marshal.*
By W. S. Walton, *Deputy.*"

[Tr. 216, 217.]

On April 15, 1925, Jasper Thomason filed his "notice of special appearance and of motion to quash service of subpoena, etc.", which sought to quash the service of subpoena upon Jasper Thomason, and to set aside the order *pro confesso* and final decree on the ground that the only attempted service was on his daughter, Rosamond Mildred Hunt, formerly Thomason, who was at the time under eighteen. [Tr. 148-

151.] There was no request to allow Thomason to defend, no statement that he had a meritorious defense, no showing of diligence, and no waiver of limitations.

In support of the motion were attached three affidavits and points and authorities. [Tr. 152-163.]

Jasper Thomason's affidavit set forth that the court had appointed no one to serve him other than the marshal or his deputy; that "the said marshal*l* did not, nor did any of his deputies, on the 13th day of May, 1921, or at any other time, deliver to affiant a copy of any subpoena issued in the above entitled action, and particularly was no copy of the alias subpoena issued herein on the amended supplemental bill of complaint under date of May 9, 1921, ever delivered to affiant by the said marshal or any of his said deputies, and affiant was not present at the time of delivery of copy of any subpoena to his daughter, Rosamond Mildred Thomason;" that on May 13, 1921, the affiant has only four daughters, all of whom were then married except Rosamond Mildred Thomason, who has since married and whose name is now Rosamond Mildred Hunt. That on May 13, 1921, Rosamond Mildred Thomason was the only member or resident of the affiant's family who could properly be known by the name of Miss Thomason. Affiant then shows by birth certificate that on May 13, 1921, Rosamond Mildred Thomason was only seventeen years, four months old. [Tr. 152-156.]

Rosamond Mildred Hunt's affidavit stated that on May 13, 1921, she was Jasper Thomason's only unmarried daughter, and the only member or resident in

her father's family who was or could be known as Miss Thomason. "That on the said 13th day of May, 1921, one W. S. Walton, who, as affiant is informed and believes, was at that time deputy United States marshal for the Southern District of California, delivered to her a copy of the alias subpoena upon amended supplemental bill of complaint in the above entitled action, and that the said copy of subpoena was not, nor was any copy thereof so far as affiant knows, delivered by the said Walton to her father, Jasper Thomason. That the said Jasper Thomason was not present at the time of the delivery of the said copy of subpoena to affiant, and no other copy of subpoena in the said action was on said day or at any other time ever delivered to affiant." [Tr. 156-158.]

Nellie M. Thomason, Jasper Thomason's wife, in her affidavit stated the family facts set forth in the other two affidavits. [Tr. 159-161.]

On April 27, 1925, plaintiff filed a notice of motion for a continuance of the hearing on Jasper Thomason's motion to quash on the ground that Mr. Lewinson was the only counsel familiar with the facts; that he had not had time to prepare, and would be engaged in a jury case on the date for which the motion was noticed; and on the further ground that there should be an oral hearing with opportunity for cross-examination. [Tr. 237-240.]

In support of the motion was filed an affidavit of Joseph L. Lewinson. [Tr. 240-245.] It set forth that affiant was the only counsel for plaintiff familiar with

the facts of this litigation which had extended over a period of seven years; that affiant by reason of various circumstances set forth in detail had not had an opportunity to prepare affidavits and authorities to resist the motion. The affidavit quotes the return of May 13, 1921, by W. S. Walton, and its amendment on October 4, 1923, and states that about the time the return was amended Meryle Thomason Davis, Jasper Thomason's daughter, testified that Jasper Thomason had an adult daughter residing in his household on May 13, 1921, and prior and subsequent thereto. The affidavit then goes on:

"Your affiant charges that it is clear to a moral certainty that said Jasper Thomason personally received said *subpoena ad respondendum* from his daughter and in that connection states: It is charged in said amended supplemental bill of complaint that one H. F. Davis and one Meryle Thomason Davis participated with said Jasper Thomason in the frauds found by the court to have been committed by said Thomason; that said H. F. Davis was up to and including the trial of said cause, a son-in-law of said Jasper Thomason, and said Meryle Thomas Davis is a daughter of said Jasper Thomason; that said Davis was a defendant in said cause and an attorney for numerous other defendants therein. Said Meryle Thomason Davis was a witness in said cause and said Jasper Thomason was subpoenaed as a witness and evaded service of such subpoena; that in order to serve such subpoena, plaintiff not only placed the same in the hands of the United States marshal, but also procured an order for the service of the same by private persons and employed the Pinkerton National Detective Agency to serve the same. Said

agency employed numerous operatives to locate said Thomason and serve said subpoena, but said Thomason evaded process; that at the time of the trial of said cause, said H. F. Davis did not appear, although charged with frauds of the gravest character, and at said trial, said Meryle Thomason Davis testified that said H. F. Davis, who was her husband, was at the time in the Republic of Mexico, and that said Jasper Thomason was at a place unknown and beyond the reach of communication in the mountains of Kern county." [Tr. 243.]

The affidavit continued that because of the complicated facts of the case it would take at least two days to cross-examine Jasper Thomason, that "affiant verily believes said Thomason would not submit to said cross-examination for fear of contempt of court and prosecution for perjury." The affidavit prays a continuance and a hearing on oral testimony.

On the same day, April 27, 1925, Mr. Ashburn, one of the solicitors for Jasper Thomason, made and filed an affidavit detailing various telephone conversations with Mr. Lewinson and the state of Mr. Ashburn's calendar in opposition to the continuance. [Tr. 163-165.]

On the same day, April 27, 1925, Jasper Thomason also filed affidavits of Meryle Thomason Davis, W. S. Mortenson, and Rosamond Mildred Hunt. [Tr. 253-260.]

Meryle Thomason Davis in her affidavit denied that she testified that Jasper Thomason had an adult daugh-

ter residing in his household on May 13, 1921, and denied that such was the fact. She denied Thomason evaded service and sets forth that he could have been found at his various residences in Pasadena, Santa Monica, and Brentwood Park, California, from January 23, 1920, to August 26, 1923. The street addresses and the dates he occupied each residence are given. She stated that on August 26, 1923, Jasper Thomason went to Nevada with the affiant on business for six weeks, and that aside from short trips to his wife's ranch near Wineville, California, he has been at his residence in Brentwood Park ever since. She further stated that Jasper Thomason was suffering from a nervous breakdown. [Tr. 253-255.] Attached is an unsworn letter from a Dr. Brainerd to Judge James saying it would be detrimental to Thomason's health to appear in court. [Tr. 256.]

Dr. Mortensen's affidavit states that it would endanger Thomason's life to make him appear in court. [Tr. 256, 257.]

The material part of Rosamond Mildred Hunt's affidavit is as follows:

"* * * that the *subpoena ad respondendum* referred to in the affidavit of Joseph L. Lewinson on motion for continuance, which affidavit is dated April 25, 1925, was never delivered to Jasper Thomason by her, and she verily believes that said subpoena was never delivered to said Jasper Thomason at any time.

"That at the time said subpoena was left at the dwelling house of said Jasper Thomason, a copy thereof was offered to this affiant. She refused to receive

it and did not take it into her possession or handle it at all. That the marshal, or the person who left the said subpoena, after offering it to affiant, threw it on the floor in her presence and it remained there for some time. At the time he offered the said subpoena to affiant she was on the inside of the house and there was a screen door between herself and said marshal*l*. *She told the marshall at that time that she was not of age,* and that she had no right or disposition to receive any papers for her father, that if he wanted to serve any papers upon her father or transact any business in which he was interested that he should see her father, and that he would probably be at home soon.

"Affiant further says that the said subpoena left as aforesaid disappeared before the return of her said father, Jasper Thomason, and she verily believes that the said subpoena never came into the possession of her said father at any time." [Tr. 258-259.] (Italics ours.)

We wish to point out to the court that Rosamond accuses the marshal not of making a mistake as to her age, but of making with knowledge a deliberately false return.

On April 27, 1925, Judge James, to whom the case had been reassigned, denied the continuance, and gave plaintiff two days to file authorities. [Tr. 246.]

On April 29, 1925, plaintiff filed an affidavit of Mr. Lewinson in opposition to the motion to quash [Tr. 247-252], which contains everything contained in his affidavit on the motion for a continuance and in addition the following:

"* * * and at said trial. said Meryle Thomason Davis testified that said H. F. Davis, who was her husband, was at the time in the Republic of Mexico and that said Jasper Thomason was somewhere in Kern county, California, at a location which no one knew, but that she, Meryle Thomason Davis, had talked to him during the previous week.

"That if upon a consideration of plaintiff's 'Memorandum of Points and Authorities', filed herewith, this Honorable Court shall nevertheless be of the opinion that the return of the marshal herein may be contradicted and that the other points made by the plaintiff in said memorandum are not sufficient to warrant a denial of said motion, affiant prays that this motion be set down for hearing upon oral testimony; that the facts in said case are complicated and involve numerous transactions; that by reason of defendant Jasper Thomason's intimate personal relationship with other defendants, and by reason of the other matters and things herein averred, affiant verily believes that if said defendant Jasper Thomason and said defendant's daughter, Rosamond Thomason Hunt, are required to appear before this Honorable Court and by oral testimony support their contentions upon this motion, it will appear beyond question that this motion is not made in good faith but solely for purposes of delay, and that said defendant Jasper Thomason has been guilty of laches in prosecuting this motion, and that he had at all times knowledge of the pendency of this action and of proceedings therein taken against himself, and that he did in fact on or about May 13, 1921, receive from some member of his household the copy of the subpoena left by the marshal." [Tr. 250-251.]

Jasper Thomason filed an additional affidavit of Meryle Thomason Davis quoting her testimony at the trial on the question of whether her father had an adult daughter residing in his household in May, 1921. Under examination by Mr. Lewinson in the morning she testified that her father had an adult daughter residing in his household in May, 1921. Under examination of her own counsel in the afternoon she said that her youngest sister at the time of attempted service on her was only seventeen. [Tr. 260-267.] The foregoing affidavit was not filed till August 5, 1925, according to the record [Tr. 267], which was after the order deciding the matter. The affidavit was receipted for, however, on April 30, 1925, and was undoubtedly delivered to Judge James personallv.

While Jasper Thomason's motion to quash was pending, on May 7, 1925, plaintiff filed an *ex parte* "application to amend marshal's return *nunc pro tunc*." [Tr. 268-270.]

On the same dav plaintiff filed an affidavit of W. S. Walton which is of such vital importance on this appeal that it is quoted in full:

"My name is W. S. Walton. From December, 1914, to March, 1922, I was a duly appointed, qualified and acting United States deputy marshal for the Southern District of California, except during a portion of the years 1918 and 1919. During the period mentioned C. T. Walton was the duly appointed, qualified and acting United States marshal for said district.

"In May, 1921, a *subpoena ad respondendum* directed to Jasper Thomason and Meryle T. Davis was

placed in my hands as deputy United States marshal, as aforesaid, for service upon said defendants; that prior to being placed in my hands said subpoena had been in the hands of three deputy United States marshals for service, and the same had not been served; that on May 9, 1921, I proceeded to the residence of said Jasper Thomason in the city of Santa Monica, county of Los Angeles, state of California. I spent about one hour in watching said residence, being seated in an automobile in close proximity to the same. While I was so watching said house, I saw an elderly man go from the yard into the house and return three times. At the time I believed said man was the defendant, Jasper Thomason, and I still believe so. After so watching said place of residence, I rang the front door bell and a woman answered the same. I had substantially the following conversation with said woman:

"She came to the door, and I asked her if this was the home of Jasper Thomason, and she said that it was. I asked her if he was home, and she said 'No, he is not here. I think he is down in Imperial Valley.' I said, 'Are you his wife?' She said, 'No. I am his daughter.' I said, 'I have some papers to serve on Mr. Thomason, and I think I can serve them on you. You are of age, aren't you?' And she said, 'I am twenty-six years old.' I said, 'What is your name?' and she said, 'I am a married daughter of Mr. Thomason.' I said, 'All right. I have a right to serve this on any adult member living in the same house. This is Mr. Thomason's home, isn't it?' She said, 'Yes.' She took the papers in her hand, and she said, 'Just a minute. Maybe I should not take these. Maybe I am getting some papers served on my father that I should not.' I said, 'You can suit yourself. I have a right to serve them on any adult member in this

house.' She dropped them, and I went out and got in my machine.

"After making said service, as aforesaid, I made return on May 13, 1921, as follows:

"'United States Marshal's Office,)
Southern District of California.) ss.

I hereby certify, that I have received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason and by delivery to and leaving with Miss Thomason for Jasper Thomason said defendants named therein, personally, at the county of Los Angeles in said district, a copy thereof.

C. T. WALTON,
U. S. Marshal.
By W. S. WALTON,
Deputy.

Los Angeles, May 13, 1921.'

"Several days prior to October 4, 1923, I was in the office of Al Sittle, then duly appointed, qualified and acting United States marshal for the Southern District of California, and Mr. Sittle called my attention to the return in said case, saying that he had been requested by the attorneys for the plaintiff to amend the same, and asked me to meet said attorneys. Said cause was then on trial, and Mr. Sittle took me into the court room and introduced me to Mr. Joseph L. Lewinson, one of the attorneys for the plaintiff. Mr. Lewinson asked me if the subpoena had been served upon an adult person who was a member or resident in the home of said Jasper Thomason, and I stated to him that it had been. He thereupon requested Mr. Sittle, in my presence, to amend the return accordingly. Mr. Sittle replied that he was willing to amend the return,

but that as the process had been served prior to his term of office, it would have to be amended in the name of his predecessor. Later, and on October 4, 1923, I returned to the office of the United States marshal, and prepared an amended return in words and figures following:

" 'Amended Return.

Frances Investment Co.
vs.
Friend J. Austin, et al.

United States Marshal's Office,
Southern District of California.

I hereby certify and return, that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Miss Thomason, an adult person, who is a member or resident in the family of Jasper Thomason, said defendant named herein, at the county of Los Angeles, in said district, an attested copy thereof, at the dwelling house or usual place of abode of said Jasper Thomason, one of the said defendants herein.

C. T. Walton,
U. S. Marshal.
By W. S. Walton,
Deputy.

Los Angeles, California, October 4, 1923.'

"Said amended return was signed by me and handed to Mr. Sittle, who filed the same with the clerk of said court.

"I know of my own knowledge that the facts stated in said return and said amended return are true, except that by inadvertence I stated the name of the person upon whom the service was made, to be Miss Thomason, when as a matter of fact service was made

on one of the married daughters of said Jasper Thomason. At the time the service was made there was a small boy in the room, who, the woman with whom the copy was left, stated was her child. She also stated, referring to the abode, 'This is my home.'

"I could without difficulty identify the person upon whom the service was made." [Tr. 274-279.] (Italics ours.)

In opposition to the application to amend the return Jasper Thomason filed a brief entitled "Memorandum in Opposition to Application to Amend Marshal's Return." [Tr. 279-297.] The argument contained in the brief is in accordance with its title. The brief begins as follows: "The application which is now made on behalf of plaintiff for amendment *nunc pro tunc* of the marshal's return of service upon the defendant Jasper Thomason contemplated the filing of a document which essentiallv falsifies the amended return upon which the order *pro confesso* was entered and the final decree rendered." [Tr. 279-280.] The concluding paragraph of the brief begins as follows: "For all of the foregoing reasons we respectfully submit to the court that the application for leave to amend the return should be denied." [Tr. 296.] An examination of the entire argument made in the brief of defendant in opposition to the motion to amend will disclose that it admits the power of the court to grant the motion and appeals to the discretion of the court to deny it. The brief made the further argument on the merits that the amendment would prove nugatory since the decree exceeded the prayer of the bill. [Tr. 295-296.]

In addition to the brief, Jasper Thomason filed six affidavits, which were referred to in the "Memorandum." [Tr. 297-314.] The transcript [page 314] shows that these affidavits were not filed till August 5, 1925, which was after the matter was decided, but they were receipted for May 13, 1925. [Tr. 313.] Probably they were delivered to Judge James instead of to the clerk, and the filing stamp was put on when they reached the clerk.

The first affidavit is that of Rosamond Mildred Hunt. Since it contradicts the affidavit of Walton, which we have heretofore quoted in full, we also set it forth in full:

"That she is the same person who submitted affidavits herein verified respectively April 7, 1925, and April 26, 1925; and supplementing the said affidavits and replying to the affidavit of W. S. Walton filed herein on or about May 7, 1925, affiant says that her father Jasper Thomason was not in or about his residence on the 13th day of May, 1921, and was at said time in the Antelope Valley, county of Los Angeles, California; that at the said time there was no person who resided in or constituted a part of the family of the said Jasper Thomason except affiant's mother and affiant.

"That on the said last mentioned date affiant's sister, Meryle Thomason Davis, together with her son, Henry Fairfax Davis, Junior, were visiting at her father's home. That prior to the arrival of the deputy United States marshal on said day the said Meryle Thomason Davis had left her father's home and had left her child with affiant; that upon the arrival of the said deputy

marshal, whom affiant believes to be the said W. S. Walton, he stated to affiant that he had a subpoena which he desired to serve upon her father Jasper Thomason and affiant stated to him that the said Jasper Thomason was not at home but was out of town; that the said deputy marshal then asked for Meryle Thomason Davis, and affiant told him that she was out of town also; that the said deputy marshal thereupon told affiant to take the said papers and hand them to her father upon his return, and affiant then said that if said marshal had any papers to serve upon her father he could bring them back again and deliver them to him when he was at home, and the said deputy then stated that he desired to leave the said paper with affiant, and that he could not be running down there all the time. Thereupon affiant said substantially, 'Can you serve these papers upon me?' And said deputy said that he could serve said papers upon any adult member of Mr. Thomason's family. Then affiant said that she was only seventeen (17) years of age and asked him if he could serve the papers upon a minor, to which the said deputy replied, 'Yes, you are seventeen (17)' and sneered. He then asked affiant her name and she said 'Thomason', whereupon he looked at the child of Meryle Thomason Davis who was then and there present and again smiled and asked 'Miss or Mrs.', to which affiant replied 'Miss Thomason.' Said deputy also asked affiant her first name and affiant's best recollection is that she told him her first name and told him correctly that it was Rosamond; meantime affiant had latched the screen door which stood between her and the said officer, who told her that she had better take the papers because if they blew away she would be in trouble. Affiant told him that she would not take the papers and if he did not want them to blow away he could put them in the mail box, but this he declined

to do, saying, 'I can't serve a mail box', and then threw the said paper upon the floor of the porch and left the premises.

"That affiant's aunt, Emma Harris, at that time lived across the street from affiant's father's residence and affiant immediately after said deputy had left went to her aunt's house and told her the whole of the said incident. That when affiant's sister, Meryle Thomason Davis, returned to her father's residence the said aunt was present and affiant, in the presence of said aunt, repeated the said incident to the said Meryle Thomason Davis.

"Affiant further says that there was not on the said May 13th, 1921, so far as affiant knows, any elderly man in the said residence of her father nor did any such elderly man go from the yard into the house and return three or any number of times.

"Affiant, referring particularly to the said affidavit of Walton filed herein, says that she did not tell him that she thought her father was down in Imperial Valley; that the said Walton did not upon the occasion mentioned in his said affidavit say to affiant, 'You are of age, aren't you?' And affiant did not say to him, 'I am twenty-six years old,' but on the contrary did tell him that she was only seventeen (17) years of age. That affiant did not say to the said Walton, 'I am a married daughter of Mr. Thomason.'

"That it is not true that affiant did take the said papers or any papers in her hand, nor did she say in substance or effect, 'Just a minute. Maybe I should not take these. Maybe I am getting some papers served on my father that I should not,' nor did she make any portion of said alleged statement.

"Affiant further says that it is not true that the said deputy then said to her, 'You can suit yourself. I have

a right to serve them on any adult member in this house.' Affiant further says that she did not state to the said Walton at said time or place, or at all, that the said small child who was in the room with her was her child, nor did the said Walton, so far as affiant remembers, ask or receive any information as to who was the mother of the said child.

"Affiant further says that she had but one conversation or interview with the said W. S. Walton and that there was but one occasion upon which a United States marshal*l* or his deputy attempted to make service upon the defendant Jasper Thomason by leaving or attempting to leave a paper with affiant, and that according to affiant's best knowledge and belief the said occasion was May 13th, 1921, and not May 9th, 1921.

"Affiant further says that she was not married on or prior to said May 13th, 1921, nor at any time prior to July 19, 1923, and that her age at the time of the said attempted service was exactly as set forth in her affidavit made herein on the 7th day of April, 1925." [Tr. 297-301.]

Again Rosamond accuses the marshal of making a wilfully false return.

Meryle Thomason Davis said in her affidavit that she was not living at her father's house on May 13, 1925, but that she was visiting there; that she was out when Walton came and had left her two-year-old son with her sister, Rosamond Mildred, who told her and their aunt, Emma Harris, about the attempt to serve the subpoena, when she returned home, substantially as is set forth in Rosamond Mildred's affidavit. [Tr. 302-304.]

Emma Harris deposed that she is and was Rosamond Mildred's aunt; that on May 13, 1921, she lived almost directly across the street from Jasper Thomason. That she knows that on May 13, 1921, no one was residing with Jasper Thomason except Mrs. Jasper Thomason and Rosamond Mildred. That on May 13, 1921, affiant saw a man talking to Rosamond Mildred Thomason at the front door of Jasper Thomason's house and at the same time saw with Rosamond Mildred the small son of Meryle Thomason Davis. That affiant knows that Rosamond was the only daughter home at the time, and the screen door was not opened. That when the man left, Rosamond came over and told her the whole story, as is set forth in Rosamond's affidavit. That later Rosamond told affiant and Meryle Thomason Davis the whole story. [Tr. 305-307.] The affiant does not say that she saw the man approach, or saw the whole interview.

Nellie M. Thomason said in her affidavit that she is and was Jasper Thomason's wife. That on May 13, 1921, all the daughters were married and none lived with them except Rosamond Mildred, although Meryle was visiting them at the time; that on said date she and her husband were visting another married daughter, Mrs. Schupp, in Antelope Valley. That Rosamond was not then married. That affiant never talked to Walton. "That affiant never saw the said subpoena so attempted to be served, nor did she ever know of its delivery by any person to the defendant, Jasper Thomason, but affiant verily believes that the said subpoena was not delivered to him, nor did it ever come into his

possession." That Jasper Thomason was sick in a sanitarium and could not make an affidavit. [Tr. 307-309.]

Mrs. Schupp, another daughter, deposed that her mother and father were visting her in Antelope Valley on May 13, 1921, and that she never talked to Walton. [Tr. 309-311.]

Verna Thomason Stark in her affidavit said she was a married daughter of Jasper Thomason and that on May 13, 1921, she lived in San Pedro, California, and believes she was home, and knows she never talked to Walton. [Tr. 311-313.]

In a brief filed May 16, 1925, plaintiff again asked to cross-examine Thomason's witnesses, and to have the marshal go on the stand and identify the person with whom he left the subpoena. [Tr. 315-316.]

On May 22, 1925, Judge James made an order allowing the return to be amended and filed *nunc pro tunc.* [Tr. 318-319.] The return as so amended is set forth on page 10 of this brief. [Tr. 216-217.]

On May 25, 1925, Judge James made an order quashing the service and vacating the decree entered against Jasper Thomason. [Tr. 320-322.]

On July 3, 1925, plaintiff moved to set aside the order of May 25, 1925. [Tr. 323-329.] Jasper Thomason's solicitors opposed the motion as *amici curiae.* [Tr. 330.] Judge James denied the motion. [Tr. 333.]

Through an error of the printer, pages 148 to 213 of the transcript are not in chronological order. The

proceedings beginning with the "Notice of Special Appearance and of Motion to Quash Service of Subpoena, etc.", on page 148 and ending with the words "Solicitors for defendant Jasper Thomason appearing specially", in the sixth and seventh lines from the bottom of page 213, should be inserted after page 234.

The affidavit of A. W. Ashburn filed April 27, 1925 [Tr. 163-166], should have been inserted immediately after the affidavit of Joseph L. Lewinson, filed April 27, 1925 [Tr. 240-245], and the affidavits of Meryle Thomason Davis, W. S. Mortensen, and Rosamond Mildred Hunt, filed together April 27, 1925 [Tr. 253-260], should follow said affidavit of A. W. Ashburn.

On checking the transcript counsel for appellant called the errors to the attention of Parker, Stone & Baird, the printers. It seems the errors occurred during the vacation of the person who usually had charge of the work. Mr. Baird offered to print the entire transcript over. Mr. Ashburn, counsel for appellee, was consulted, and he very generously said that was unnecessary. We ask the indulgence of the court if any inconvenience is caused thereby. We have endeavored to obviate the inconvenience by our statement of facts.

Errors Relied On.

1. The marshal's amended return showed good and valid service on Jasper Thomason, and such return was conclusive, especially on a motion to vacate as distinguished from a motion to be let in and defend, and in view of defendant's laches. [Assignment of Errors 1, 2, 7, 8, and 9; Tr. 340, 341.]

2. Even if the marshal's return was not conclusive, the court should have found the facts in accordance with the amended return. [Assignment of Errors 12 and 17; Tr. 341.]

3. The service should not have been quashed without an oral hearing and an opportunity for cross-examination. [Assignment of Errors 10 and 11; Tr. 341.]

4. There was a compliance with Equity Rule 13, even if the subpoena was left with Rosamond Mildred Hunt, formerly Thomason. [Assignment of Errors 4, 5 and 6; Tr. 340.]

5. Jasper Thomason made a general appearance and made the judgment against him good and valid. [Assignment of Errors 13, 14, 15, and 16; Tr. 341-342.]

6. The court erred in setting aside the service and vacating the decree, and in refusing to vacate its order so doing for the foregoing reasons. [Assignment of Errors 1-17; Tr. 339-342.]

BRIEF OF THE ARGUMENT.

I.

The record shows that Jasper Thomason on May 13, 1921, at the time of the service upon him, was within the territorial jurisdiction of the Court. The amended return of the Marshal was complete and self-supporting on its face. These facts being so, the return of the Marshal was conclusive.

A. *Where a return of an officer of the court is complete and self-supporting on its face, and where the defendant at the time of service is within the territorial jurisdiction of the court, as between the parties the return is conclusive.*

At the time of service the defendant was within the territorial jurisdiction of the court. [Tr. 254.]

The return as amended *nunc pro tunc* is complete and self-supporting on its face. [Tr. 216-217.]

The return may be amended though the officer's term has expired, and its effect is retrospective.

> *Morrissey v. Gray,* 160 Cal. 390, 396;
> *Jones v. Gunn,* 149 Cal. 687, 692;
> *Morris v. Trustees,* 15 Ill. 266, 270;
> *Herman v. Santee,* 103 Cal. 519;
> *18 Ency. of Pleading & Practice,* 963.

In a case where territorial jurisdiction is admitted, and the return is complete and self-supporting on its face, the return should be held conclusive as between the parties.

Joseph v. New Albany Steam Mill Co., 53 Fed. 180 (C. C. Ind.);
Von Roy v. Blackman, Fed. Cas. No. 16,997 (C. C. La.);
Trimble v. Erie Electric Motor Co., 89 Fed. 51 (C. C. Pa.);
Nickerson v. Warren City Tank & Boiler Co., 223 Fed. 843 (D. C. E. D. Pa.);
19 Vin. Abr. 195;
Hallowell v. Page, 24 Mo. 590;
The State to Use v. O'Neill, 4 Mo. App. 221;
Angell v. Bowler, 3 R. I. 77;
St. Louis etc. Co. ex parte Petition, 40 Ark. 141;
Smoot v. Judd, 184 Mo. 508, 83 S. W. 481 (and the multitude of cases cited);
Gwynne on Sheriffs, p. 473;
Frank P. Miller Paper Co. v. Keystone Coal Co., 110 Atl. 79 (Sup. Ct. Pa.);
Preston v. Kindrick, 94 Va. 760;
Sutherland v. People's Bank, 69 S. E. 341 (Sup. Ct. Va.);
Tillman v. Davis, 28 Ga. 494.

B. *If the court refuses to adopt the rule of conclusiveness of the marshal's return as urged by appellant under point I. A., it should at least adopt the rule in a modified form. Where territorial jurisdiction is admitted, and the marshal's return is complete and self-supporting on its face, the court should not vacate the decree founded on that return, unless the defendant shows absence of laches and a meritorious defense, and offers to waive the statute of limitations and come in and defend.*

The defendant did not ask to open the decree and make a defense in this case; he asked the court instead to vacate the decree. [Tr. 149-150.]

Nor did the defendant show a meritorious defense. [Tr. 149-150.]

The record shows the defendant had full knowledge of the pendency of the suit. [Tr. 221; 151; 153; 158; 259; 308; 102, 228; 66, 67, 128; 299; 254, 255; 250, 251.]

Nor was there any offer to waive the statute of limitations. [Tr. 149-150.]

In such a case the court should hold the return of the marshal conclusive. The only argument that has ever been advanced against the rule of conclusiveness of the sheriff or marshal's return is the injustice of denying to the defendant his day in court. When the defendant is not asking for his day in court, as in this case, but is petitioning the court to place the statute of limitations between him and plaintiff's just cause of

action, and where, as here, the defendant makes no showing of a meritorious defense, and no showing of due diligence, the court should not go off the face of the record to do injustice. Certainly in such a case the rule of conclusiveness should be applied.

St. Louis etc. Co. ex parte, 40 Ark. 141;
Wells Fargo & Co. v. Baker Lumber Co., 107 Ark 415, 155 S. W. 122;
Nichols v. Nichols, 96 Ind. 433;
Neitert v. Trentman, 104 Ind. 390, 4 N. E. 360;
Groff v. Warner, 89 N. E. 609 (Ind. App.);
Shepherd v. Marvel, 45 N. E. 526 (Ind. App.);
Cully v. Shirk, 30 N. E. 882 (Ind. Sup.);
Angell v. Bowler, 3 R. I. 77;
Locke v. Locke, 30 Atl. 422 (R. I. Sup.);
Cooke v. Haungs, 113 Ill. App. 501;
Massachusetts Benefit Life Assn. v. Lohmiller, 74 Fed. 23 (C. C. A., 7th Cir.);
Cowden v. Wild Goose Mining & Trading Co., 199 Fed. 561, 565 (C. C. A., 9th Cir.);
Martin v. Gray, 142 U. S. 236;
Gregory v. Ford, 14 Cal. 138;
Hawley v. State Assurance Co., 182 Cal. 111, 113;
State v. Hill, 50 Ark. 458;
Hilton v. Thurston, 1 Abb. Prac. (N. Y.) 318;

II.

Even if the Court refuses to adopt the rule of conclusiveness, the evidence was insufficient to rebut the Marshal's return supported by his affidavit. Certainly it should not have been impeached without an oral hearing, and an opportunity for cross-examination.

In an equity case the appellate court will review the facts as well as the law.

La Abra Silver Mining Co. v. U. S., 175 U. S. 423, 464, 465, 466.

Even in states where the return may be impeached, as in Georgia, by statute, it is held that the "strongest" testimony is necessary to overthrow it.

Davant v. Carlton, 53 Ga. 491.

The evidence offered in this case was insufficient to rebut the marshal's return supported by his affidavit. The marshal was disinterested. The only evidence to contradict him came from Thomason's family. Thomason and his family resisted plaintiff's attempt to cross-examine them. The marshal was willing to be cross-examined. The contradiction of the marshal's testimony rests really on the affidavits of Thomason's two daughters. The first daughter, Meryle Thomason Davis, was convicted by the court of the gravest frauds. The second daughter, Rosamond Mildred, cannot be believed. She stated she told the marshal she was under eighteen. This is incredible, and destroys the value of her testimony. The marshal would

not make a deliberately false return; he had no interest in so doing. It appeared that Thomason was evading service; under such circumstances, the marshal would not serve a daughter who told him she was only seventeen. [Tr. 274-279; 158; 258-259; 278; 157, 158; 258; 259; 297-301; 298; 253, 260, 302; 275; 250; 260-267.]

Certainly the return should not have been overthrown without oral examination and cross-examination.

III.

Even if we admit that the subpoena was delivered to Rosamond Mildred Hunt (formerly Thomason), as contended by appellee, and not to Meryle Thomason Davis, as contended by appellant, there was still a compliance with Equity Rule 13. The words "adult person" in Equity Rule 13 mean a "matured person" not a person of legal age.

According to the defendant's own showing, Rosamond Mildred Hunt, a member and resident in the family of defendant Jasper Thomason, received a copy of the subpoena at Jasper Thomason's dwelling house and usual place of abode. There is no showing that Rosamond Mildred Hunt was not matured and of full size and strength. It appears from appellee's own showing that she was seventeen years and four months old. [Tr. 158; 276; 151; 236.]

These facts show a full compliance with Equity Rule 13.

Equity Rule 13.
Webster's New International Dictionary.
21 R. C. L. 1281.
Phoenix Insurance Co. v. Wulf, 1 Fed. 775 (C. C. Dist. of Ind.);
In re Risteen, 122 Fed. 732 (Dist. Ct. Mass.).

IV.

By filing affidavits and a brief in opposition to plaintiff's motion to amend the Marshal's return nunc pro tunc, and by making an argument on the merits in the brief, defendant Jasper Thomason made a general appearance. Thereby he cured any defects in the jurisdiction of the court over his person and made the decree a good and enforceable decree for all purposes.

A. *By filing affidavits and a brief in opposition to plaintiff's motion to amend the marshal's return nunc pro tunc, and by making an argument on the merits, defendant Jasper Thomason made a general appearance.*

The defendant Thomason filed a brief and affidavits in opposition to plaintiff's motion to amend, appealed to the discretion of the court, and argued the merits, all while his motion to quash was still pending. [Tr. 268-279; 279-297; 296; 295-296; 297-314.]

Such action constituted a general appearance.

Bestor v. Inter-County Fair, 135 Wis. 339, 115 N. W. 809;

Stubbs v. McGillis, 44 Colo. 138, 96 Pac. 1005, 18 L. R. A., N. S., 405;

Crawford v. Foster, 84 Fed. 989 (C. C. A. 7th Cir.);

Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935;

Lowry v. Tile Mantel & Grate Assn. of Cal., 98 Fed. 817 (Cir. Ct. N. Dist. Cal.);

Orinoco Co. v. Orinoco Iron Co., 296 Fed. 965, 970 (Ct. App. D. C.);

Twin Lakes Land and Water Co. v. Dohner, 242 Fed. 399, 403, 404 (C. C. A., 6th Cir.);

Great Lakes and St. Lawrence Transportation Co. v. Scranton Coal Co., 239 Fed. 603 (C. C. A., 7th Cir.);

Lively v. Pictou, 218 Fed. 401 (C. C. A. 6th Cir.);

Ricketts v. Bolton, 173 Ky. 739, 743, 191 S. W. 471, 473;

German Mutual Farmers Fire Insurance Co. v. Decker, 74 Wis. 556, 43 N. W. 500;

Sterling Tire Corporation v. Sullivan, 279 Fed. 336 (C. C. A., 9th Cir.);

4 C. J., 1334;

Wabash Western Railway v. Brow, 164 U. S. 271, 278;

Edgell v Felder, 84 Fed. 69, 70 (C. C. A., 5th Cir.);

Clark-Herrin-Campbell Co. v. H. B. Claflin Co., 218 Fed. 429 (C. C. A., 5th Cir.);

Everett Railway Light and Power Co. v. U. S., 236 Fed. 806 (Dist. Ct. Wash.);

Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495 (C. C. Nev.);

Briggs v. Stroud, 58 Fed. 717 (C. C. E. Dist. Wis.);

Brookings State Bank v. Federal Reserve Bank, 291 Fed. 659 (Dist. Ct. Ore.);

Placek v. American Life Insurance Co., 288 Fed. 987 (Dist. Ct. Wash.);

Zobel v. Zobel, 151 Cal. 98.

B. *Where, as in this case, defendant makes a special appearance to object to the jurisdiction, as for instance a motion to quash service, and pending decision on the motion, he does something which amounts to a general appearance, his objections to the jurisdiction are waived, and his motion will be denied.*

Yale v. Edgerton, 11 Minn. 271, Gil. 184;

New Albany & S. R. Co. v. Combs, 13 Ind. 490;

Barnes v. Western U. Teleg. Co., 120 Fed. 550;

Grizzard v. Brown, 2 Tex. Civ. App. 584, 22 S. W. 252;

Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670;

German Ins. Co. v. Frederick, 7 C. C. A. 122, 19 U. S. App. 24, 58 Fed. 144 (C. C. A., 8th Cir.).

C. *The fact that the general appearance is made after the decree instead of before is immaterial. It cures any defects in the jurisdiction of the court over the person of the defendant and the decree is a good and enforceable decree for all purposes.*

Ann. Cas., 1914 C, 694, note;
4 C. J., 1364, 1365;
Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670;
Sugg v. Thornton, 132 U. S. 524, 530;
Security Loan and Trust Co. v. Boston etc. Co., 126 Cal. 418;
Willett v. Blake, 134 Pac. 1109 (Sup. Ct. Okla.);
Johnson Loan and Trust Co. v. Burr, 51 Pac. 916 (Ct. App. of Kan.);
Boulder Colorado Sanitarium v. Vanston, 94 Pac. 945 (Sup. Ct. of N. M.);
Crowell v. Kopp, 189 Pac. 652 (N. M. Sup.);
Jackson v. Lebanon Reservoir and Ditch Co., 171 Pac. 997 (Ariz. Sup.);
German Mutual Farmers Fire Insurance Co. v. Decker, 74 Wis. 556, 43 N. W. 500;
Barba v. People, 18 Colo. App. 16;
Ryan v. Driscoll, 83 Ill. 415;
McCarthy v. McCarthy, 66 Ind. 128;
Balfe v. Rumsey etc. Co., 55 Colo. 97, 133 Pac. 417;
Pry v. Hannibal and St. Joseph R. R. Co., 73 Mo. 123;
Tisdale v. Rider, 104 N. Y. S. 77;

Borough of Jeannette v. Roehme, 47 Atl. 283 (Sup. Ct. of Pa.);
Nelson v. Nebraska Loan and Trust Co., 87 N. W. 320 (Sup. Ct. of Neb.);
Nebraska Loan and Trust Co. v. Kroener, 88 N. W. 499 (Sup. Ct. of Neb.);
Barnett v. Holyoke Mutual Fire Insurance Co., 97 Pac. 962 (Sup. Ct. of Kan.);
Clarkson v. Washington, 131 Pac. 935 (Sup. Ct. of Okla.).

ARGUMENT.

I.

The record shows that Jasper Thomason on May 13, 1921, at the time of the service upon him, was within the territorial jurisdiction of the court. The amended return of the Marshal was complete and self-supporting on its face. These facts being so, the return of the Marshal was conclusive.

A. *Where a return of an officer of the court is complete and self-supporting on its face, and where the defendant at the time of service is within the territorial jurisdiction of the court, as between the parties the return is conclusive.*

On May 13, 1921, it is admitted by the defendant's own affidavits that Jasper Thomason was within the territorial jurisdiction of the court. [Tr. 254.] There can likewise be no question that the return as amended

nunc pro tunc is complete and self-supporting on its face. The return is as follows:

"Amended Return.) Southern District of Cali-
Frances Invest. Co.) fornia.
vs. D-61) United States Marshal's
Friend J. Austin, et al.) Office,

I hereby certify and return that I received the within writ on the 9th day of May, 1921, and personally served the same on the 13th day of May, 1921, on Jasper Thomason by delivering to and leaving with Jane Doe, whose true name is to the undersigned unknown and who is and on said 13th day of May, 1921, was an adult person and a member of the family and resident in the family of Jasper Thomason said defendant named therein, at the county of Los Angeles, in said district, an attested copy thereof, at the dwelling house and usual place of abode of said Jasper Thomason, one of said defendants herein.

C. T. WALTON,
~~A. C. Sittel,~~ *U. S. Marshal.*
By W. S. WALTON, *Deputy.*"

[Tr. 216, 217.]

Equity Rule 13 is as follows:

> "The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family."

It will be seen that the return shows a compliance with the rule in all respects.

Of course, it can make no difference that Walton was no longer an officer at the time the return was

amended. Nevertheless, he may amend his return *nunc pro tunc.*

> *Morrissey v. Gray,* 160 Cal. 390, 396 (citing numerous cases);
>
> *Jones v. Gunn,* 149 Cal. 687, 692;
>
> *Morris v. Trustees, etc.,* 15 Ill. 266.

In *Morris v. Trustees, etc., supra,* the court said at page 270:

> "* * * That decision is conclusive of this case, except in one particular. Here the official term of the sheriff had expired. But that did not prevent him from perfecting the return. He amended the return as sheriff, and he may be held liable in that character if it was false. It was not the doing of a new act, but merely furnishing the legal evidence of an act done while in office. This position is sustained by adjudged cases. In *Adams v. Robinson,* 1 Pick. 461, a sheriff was allowed to sign a return to an attachment after he had ceased to be an officer. In *Gray v. Caldwell,* Hardin 63, a sheriff was permitted to indorse a return on a writ of *ad quod damnum,* several years after he was out of office. See, also, *Childs v. Barrows,* 9 Metc. 413; *Gilman v. Stetson,* 16 Maine 124; *Rucker v. Harrison,* 6 Munf. 181; *Hutchins v. Brown,* 4 Harris & McHenry, 498, and *Brown's Adm'r v. Hill,* 5 Pike 78."

Such amendment will be permitted long after judgment is entered.

> *Jones v. Gunn,* 149 Cal. 687, 692.

Such amendment may be permitted by the court upon the hearing of a motion to vacate the judgment even though no notice of such proposed amendment has previously been given to the moving party.

Herman v. Santee, 103 Cal. 519.

And the amendment has a retroactive effect. Thus it is said in 18 *Ency. of Pleading and Practice,* 963:

> "An amendment of the return relates back to the original return and operates from that time, where the rights of innocent third parties are not affected." (Citing many cases.)

To the same effect, see:

Jones v. Gunn, 149 Cal. 687.

So we have a case where we have a return complete and self-supporting on its face, with territorial jurisdiction admitted and a defendant seeking to show that the return is false, in order to make void and vacate a decree. It is the contention of the appellant that in such case the return is conclusive. If so, of course, Jasper Thomason's motion to vacate should have been denied. We do not believe that the question raised is settled by any authority binding on this court. Before reviewing the authorities we shall discuss the question on principle.

When a defendant is not within the territorial jurisdiction of the court, that is, when he is not within the boundaries of the sovereignty of which the court is an agent, it may be that he should be allowed to contradict an officer's return that shows the

contrary. It is not merely a question of whether he has been given notice by the officer of the court; it is a question whether the sovereign ever acquired power over him. Moreover, he has a right to have the suit tried in the courts of his own sovereign.

It seems clear, also, that when the officer's return is not complete and self-supporting on its face, it cannot be conclusive, since the plaintiff to support it must offer extraneous evidence.

In other cases, the officer's return should be conclusive. We have not a question of jurisdiction in the strict sense, as in the case when the defendant is not within the boundaries of the sovereignty; we have a question of whether the defendant has been given notice of the pendency of the proceedings. Of course, if there is not the proper notice, the court has no jurisdiction over the defendant's person. How is the court to determine that question? In the first instance, of course, it must be determined from the return of its officer. The court should not go further, if the defendant is within the territorial jurisdiction of the court, and if the return is complete and self-supporting on its face.

Litigation has already become so interminable that many honest litigants are kept out of the courts. Questions must be determined finally at some time. If the court is to take its time to examine into the truth of the statements of its sworn officers, whenever questioned, there will be no end. It is not the cases where there is merit in the contention that will trouble

the court; they will be few. It is the cases where the point is but one more means of delaying justice, already too long delayed.

We regard the argument often made for the conclusiveness of the return; namely, the absolute verity of the court's own records, as of not as much force as the necessity for speedy justice.

It will be urged that in some cases the defendant will have judgment against him without a hearing. This is undoubtedly true, though the cases will be few. The defendant, however, has his remedy by an action against the marshal for a false return. It will be replied that this gives the defendant but slow justice. The answer is that it is better for justice to be delayed in the few cases where there is a false return, than in the many cases where the claim would be made without foundation.

Most legal rules rest on a balancing of interests. We submit that the interest of speedy justice for the majority of litigants must outweigh the temporary injustice in the rare case of a false return.

Moreover, if the only remedy is against the officer for a false return, he will tend to be very careful. This is pointed out in *Smoot v. Judd,* 184 Mo. 508.

It has been urged that a distinction should be made when the facts of the return are not within the personal knowledge of the officer, but where he derives his knowledge from others, as in the instant case, whether the person served was an adult person who

was a member of or resident in the family of the defendant. In every case, however, the return must rest on information derived from others as to the facts. Take the simplest possible case. The marshal is given a subpoena to serve on John Doe. He returns that he served John Doe personally. He must derive this information from others. He must determine whether the person served really is John Doe, or whether, perhaps, he is not Richard Roe. What the law does is to confide to him the task of finding out. This argument is admirably stated by the late Judge Baker in *Joseph v. New Albany Steam Mill Co.*, 53 Fed. 180, 181, quoted *infra.*

In the lower court counsel for Jasper Thomason invoked the argument *ad hominem,* and used the present case as an instance of the injustice of the rule of conclusiveness, saying: "Otherwise parties may, as in the instant case, be adjudged guilty of the 'gravest frauds' without ever having had a hearing before the court and without in fact knowing of the pendency of the proceeding." We challenge the statement that Jasper Thomason had no knowledge of the proceedings, and shall discuss that question at length *infra.* But indeed the instant case is an example of the necessity for the rule of the conclusiveness of the return. Jasper Thomason's whole family was involved in the frauds perpetrated upon plaintiff. His son-in-law was found guilty after a trial on the merits of conceiving the conspiracy. [Tr. 102, 228.] Thomason participated in it. [Tr. 103, 228.] His daughter,

who was a witness at the trial, made a false affidavit of service. [Tr. 66, 67, 228.] This same daughter at the trial testified that at the time of trial Jasper Thomason was somewhere in Kern county, California, at a location which no one knew, but that she, Meryle Thomason Davis, had talked to him during the previous week. [Tr. 250, 251.] With confidence we assert that the instant case is an illustration of the danger of not holding the marshal's return to be conclusive. After seven years of litigation, after fighting the case to a finish through the other members of his family and losing, Jasper Thomason now comes in and says: "My daughter was not eighteen; she was seventeen years and four months. The decree must be set aside, so that I may have the benefit of the Statute of Limitations."

We turn now to a review of the authorities.

Joseph v. New Albany Steam Mill Co., 53 Fed. 180 (Circuit Court Indiana), was a suit to foreclose a pledge of choses in action and for other equitable relief. A subpoena in chancery was issued to the marshal, upon which he made a return to the effect that he had served the same upon one John Marsh, agent of the defendant in custody of its property and in charge of its office. A copy of the return is set forth in the opinion. The defendant moved to quash the return on the ground that said Marsh was not its agent or in its employ at the time the writ was served. This motion was overruled. Judge Baker said at page 181:

"Whatever may be the rule in other states in regard to the effect of the return of an officer in executing mesne or final process, I think it is the settled law in this state that the return of a sheriff showing that he has served the writ in the manner prescribed by the statute, for the purpose of giving the court jurisdiction, is conclusive against a collateral attack. (Citing cases.)

"It is argued that while the return may be conclusive for the purpose of conferring jurisdiction, where the facts stated in the return are within the personal knowledge of the officer, it ought not to have such conclusive effect where the facts stated in such return presumably rest upon information derived from others. In my opinion, where the facts stated in the return are such as the law requires the officer to ascertain and return under his oath of office, the manner in which he has ascertained the facts is immaterial. In every instance of the personal service of process, the officer must determine that the person served is the identical person named in his writ. So, where service is made by copy left at the defendant's last and usual place of residence, the officer must determine the identity of the party, and that the place where the copy is left is the last and usual place of residence of such party. The law has imposed the duty of ascertaining these facts upon the sheriff, and whether he finds and returns the facts from personal knowledge or otherwise, it makes no difference in the rule of law. (Citing cases.) If it were open to a party to contradict the sheriff's return collaterally, in every case where the facts returned by him did not lie within his personal knowledge,

it would open the door to endless conflict and confusion. The law in this state is firmly settled that the facts which the sheriff is required by law to ascertain and return in obedience to his writ, when so ascertained and returned by him, cannot be impeached collaterally, by a resident of the state, for the purpose of quashing the service and return and ousting the court of jurisdiction, by showing that the facts exhibited in the return are untrue."

Frank Parmelee Co. v. Aetna Life Ins. Co., 166 Fed 741 (C. C. A., 7th Circuit), should be considered with the Joseph case. Plaintiff sued defendant upon a policy of liability insurance. The policy required the assured in case of suit to mail the summons to the insurance company. The declaration alleged that suit was brought against the assured, and that a return was made by the sheriff that service had been made upon one, Gany, the secretary of the assured. That Gany was not secretary nor agent of the assured. That the assured discovered the pendency of the suit, notified the insurance company of all the facts, and on the insurance company's refusal to defend, the assured defended and lost. Defendant demurred on the ground that since the return of summons in the case against the assured could not be attacked by the assured, the condition of the policy had been violated. The demurrer was sustained, and plaintiff appealed. There was a reversal on the grounds that (1) the return could have been attacked, and (2) plaintiff substantially complied with the condition of the policy by notifying defendant of the facts.

It would seem that the case must be rested on the second ground. The court recognized the authority of *Joseph v. New Albany Steam Mill Co.,* and said that case was different (pp. 743, 744). But both cases involved impeaching the return by showing that a certain person was not the agent of the defendant. The question, however, arose collaterally in *Frank Parmelee Co. v. Aetna Life Ins. Co.,* and that undoubtedly is its explanation; namely, that the question did not arise between the parties to the suit in which the return was made. Since the court recognized the *Joseph* case, the *Parmelee* case should be so explained or rested upon the second ground assigned by the court for its decision.

In *Von Roy v. Blackman,* Fed. Cas. No. 16,997, there was a suit in equity in which defendant by plea in abatement objected to the sufficiency and legality of the service of process upon her. The court (Circuit Court, District of Louisiana) in declaring the plea bad, said:

> "The authorities are numerous and weighty in support of the proposition, that in the same case the parties cannot question the return of the officer: Benn & H. Dig. tit. 'Officer,' subd. 5; *Id.* 'Return of Officers'; Lawrence v. Pond, 17 Mass. 432; Com. Dig. tit. 'Return,' F, 2; Barr v. Satchwell, 2 Strange, 813; 2 Phil. Ev. (Ed. 1859, Cowan & Hill's Notes) 370; 3 Bouv. Inst. 190, 2795; Cow. Treat, 335 art. 867; Goubot v. De Crouy, 1 Cromp & M. 773; Putnam v. Man, 3 Wend. 202; Case v. Redfield, 7 Wend. 339;

Evans v. Parker, 20 Wend. 622. I have endeavored to find cases which would support the proposition urged by the defendants, that where a fact involving an opinion was returned by the sheriff, there might be an exception to the rule that the return could not be denied. But the principle seems to be settled, that as to parties and privies, the return of the sheriff, as to any fact which he was bound to return, is conclusive. In Lawrence v. Pond, *supra*, the return was as to the qualifications of the appraisers of land taken on exception. In Goubot v. De Crouy, 1 Cromp. & M. 772, the return was 'that the defendant was and yet is in the service of the Sicilian minister at the British court as a domestic servant.' Busby moved to set aside the return on strong affidavits, showing fraud and collusion between the sheriff's officer and the defendant; that the defendant was in trade; that he had said he was endeavoring to get attached to the embassy; that he had been taken and collusively discharged by the officer. The court says: 'We cannot interfere upon motion; your only course is by bringing an action against the sheriff for false return.' In Case v. Redfield, *supra*, evidence was offered that a copy of the attachment was not left at the dwelling-house, or last place of abode of the defendant, and it was excluded. In the case of Van Rensselaer v. Chadwick, 7 How. Prac. 297, the court seems to hold that the return of the sheriff is not conclusive, and may be contradicted. This would be in opposition to the other cases which I find, and they are so numerous that I have no doubt upon the subject. In the case of Earle v. Mc-

> Veigh, 91 U. S. 503, I am satisfied that the decision, so far as it involves the question here presented, was based upon the ground that the impeachment of the return was in a second suit. The plea is therefore bad, since it traverses the return of the marshal in the same cause in which it is made."

The court then went on to hold that although the plea was bad, the return was defective on its face; so further proceedings were stayed until there was a new return of service.

Trimble v. Erie Electric Motor Co., 89 Fed. 51 (C. C. Pa.), is a square authority in favor of the contention of appellant.

Nickerson v. Warren City Tank & Boiler Co., 223 Fed. 843 (D. C. Pa.) holds that the facts can be inquired into when the return is not self-supporting, but that when the return is self-supporting it is conclusive.

At common law the rule of conclusiveness was undoubted (19 Vin. Abr. 195). The law of England has always been settled that the sheriff's return is conclusive. (See the quotations from *Gwynne on Sheriffs* and from *Smith's Leading Cases, infra.*)

The state decisions are in conflict. In many states the question is governed by statute. The Supreme Court of the United States has held that neither the statutes nor decisions of the state courts need be followed on this question by the federal courts. (*Mechanical Appliance Company v. Castleman,* 215 U. S. 437, 442, 443.)

The long opinion in *Smoot v. Judd,* 184 Mo. 508, contains a splendid collection of authorities. The question arose on a bill in equity to set aside a judgment at law. This would seem to be immaterial, but at all events the cases where the attack on the return was in the court of law are also reviewed.

The court said at page 518:

> "Ever since the decision of this court in Hallowell v. Page, 24 Mo. 590, the law has been uniformly declared in this state to be that 'the return of a sheriff on process, regular on its face, and showing the fact and mode of service, is conclusive upon the parties to the suit. Its truth can be controverted only in a direct action against the sheriff for false return.' [Heath v. Railroad, 83 Mo. 617; Decker v. Armstrong, 87 Mo. 316; Phillips v. Evans, 64 Mo. 1, c. 23; State *ex rel.* v. Finn, 100 Mo. 429; Delinger's Admr. v. Higgins, 26 Mo. 1, c. 183; McDonald v. Leewright, 31 Mo. 29; Reeves v. Reeves, 33 Mo. 28; Stewart v. Stringer, 41 Mo. 1, c. 404; Jeffries v. Wright, 51 Mo. 215; Magrew v. Foster, 54 Mo. 258; Anthony to Use, etc., v. Bartholow, 69 Mo. 1, c. 194; Bank v. Suman, 79 Mo. 1, c. 532. (In this case it was held that parol evidence was inadmissible in aid or support of the return, to show service in fact, though not in the manner set out in the return, and was admissible against the return only in a suit against the sheriff for a false return); Bank to Use v. Gilpin, 105 Mo. 1, c. 23; Feurt v. Caster, 174 Mo. 1, c. 297.]"

And at 519 and 520 the court said:

"Gwynne on Sheriffs, page 473, thus states the law: 'It is a well-settled principle of the English law that the sheriff's return is not traversable, and the court will not try on affidavits, whether the return of a sheriff to a writ is false, even though a strong case is made out, showing fraud and collusion, but the party must resort to his remedy by an action against the sheriff for a false return. In Connecticut, the return of the sheriff on mesne process is held to be only *prima facie* evidence, but even in that state he cannot falsify it by his own evidence. In most, and probably in all, of the other states in the United States, the rule is established that as between parties to the suit, in which the return is made, and privies, and the officer, except when the latter is charged in a direct proceeding against him for a false return, the sheriff's return is conclusive and cannot be impeached. A party or privy may not aver the falsity of a return made by a proper officer, without a direct proceeding against the officer, even in chancery."

And at 530 the court said:

"The annotators of Smith's Leading Cases, Hare and Wallace (1 Smith's L. C. 842), sum up the law on this subject as follows: 'Whatever the rule may be where the record is silent, it would seem clearly and conclusively established, by a weight of authority too great for opposition, unless the ground of local and peculiar law, that no one can contradict that which the record actually avers, and that a recital of notice or appearance, or a return of service by the sheriff, in the

record of a domestic court of general jurisdiction, is absolutely conclusive, and cannot be disproved by extrinsic evidence.' "

In *Frank P. Miller Paper Co. v. Keystone Coal Co.*, 110 Atl. 79 (Sup. Ct. Pa.), which is in point on the facts, the court said at page 79:

> "In the absence of fraud, which is not here alleged, a sheriff's return, full and complete on its face, is conclusive upon the parties and cannot be set aside on extrinsic evidence." (Citing many cases.)

In *Tillman v. Davis*, 28 Ga. 494, the court held that a return of service on the writ by the sheriff cannot be traversed, except for fraud or collusion. Lumpkin, J., said at pages 497 and 498:

> " 'The return of the sheriff,' says Baron Comyn, 'is of such high regard, that generally no averment shall be admitted against it. As if A. be returned to be outlawed, he cannot say that he was only *quarto* or *quinto exactus*. Kit., 280. If the sheriff return issues upon B., it cannot be averred by A. to save the issues, that his name is not B.—2 Rol., 462, l. 5. If the sheriff in *re-disseisin* returns *accessi ad terras, etc.*, it cannot be assigned for error, *quod non accessit*—Leon., 183. If *coronors* make a return it cannot be said that only *one* made the return.—R. Raymond, 485. If a sheriff returns *scire feci* A. tennen' un' mess', A. cannot plead *non tenet*. R. Cro. Eliz., 872; R. Mod. 10 (Com. Dig. Title Retorn G. 6 vol., 242-243).

"Sheriffs' return not traversable; but you may have an action for a false return.—Loft., 631; Rex v. Elkins, 4 Burr, 2127; Barr v. Satchwell, 2 Str., 813.

"But I will not multiply citations upon this point. I have investigated carefully in Brooke and Viner's abridgments, and traced the question to its fountain head, and find it well settled that by the common law no averment will lie against the sheriff's return, and one reason assigned amongst others is, that he is a sworn officer, to whom the law gives credit. Jenk. 143, pl. 98. There are some exceptions to the general rule in favor of life and liberty, and some modifications made by several ancient statutes. But they are slight and restricted to returns upon particular subjects, and do not affect the present case. It is also true, that while the return of the sheriff, in certain cases, will not be allowed to be controverted in the same action, an averment may be made contrary to the same return in another action.

"I lay down another proposition, which seems to be uniform and incontrovertible: that a return of the sheriff which is definitive to the trial of the thing returned, as the return of the sheriff upon his writs, cannot be traversed. Brook's Abr. Title Averment; Viner's Abr. Title Return, vol. XIX.

"All the American authorities are collected in note (d.) appendix to vol. 2, Cowen & Hill's notes to Phillips on Ev., p. 794, and, as I stated in the beginning of this opinion, with a solitary exception, there is an unbroken array of American

cases in favor of the well-established English rule, that as between the parties to the process or their privies, the return of the sheriff is usually conclusive, and not liable to collateral impeachment, except for fraud or collusion; a rule so necessary to secure the rights of the parties, and to give validity and effect to the acts of ministerial officers, leaving the persons injured to their redress by an action for a false return; and that this rule concluding the parties, applied to mesne process, by which the parties are brought into court."

There was a dissenting opinion. The law of Georgia seems to have been changed by the Georgia code. (See *Jinks v. American Mortgage Company,* 102 Ga. 694-695.)

See, also, the following authorities sustaining the rule of conclusiveness:

Sutherland v. People's Bank, 69 S. E. 341 (Sup. Ct. Va.);
Hallowell v. Page, 24 Mo. 590;
Angell v. Bowler, 3 R. I. 77;
St. Louis etc. Co. ex. Parte Petition, 40 Ark 141;
The State to Use of O'Neill, 4 Mo. App. 221;
Preston v. Kindrick, 94 Va. 760.

Blythe v. Hinckley, 84 Fed. 228 (C. C. Cal.), a decision by Judge Morrow, was heavily relied upon by appellee in the lower court. The return showed service on Florence Blythe Hinckley, by delivering to

and leaving the subpoena "with Mrs. Harry Hinckley, an adult person, who is a resident in the *place of abode* of Florence Blythe Hinckley." The court held that the return was bad on its face, since it did not show that Mrs. Harry Hinckley was a member or resident of the *family* of the defendant, as required by Equity Rule 13. The court showed that if the defendant lived at a hotel, the writ might be delivered to a stranger and be within the words of the return. The court said at page 241 that if it was confined to the face of the return, the service would be insufficient. It then went on to show at pages 241 and 242 that if it went off the face of the return and examined the affidavits filed, the service would still be insufficient. Of course, in such a case the marshal's return could not be held conclusive, because it was not complete and self-supporting on its face. This case cannot be an authority for defendant in any event, because it was not a motion to vacate, but to let in and defend. (See p. 240 and Point I. B. *infra.*)

Peper Automobile Co. v. American Motor Sales Co., 180 Fed. 245 (C. C. E. D. Mo. E. D.); *Mechanical Appliance Company v. Castleman,* 215 U. S. 437, and *Higham v. Iowa State Travelers' Assn.,* 183 Fed. 845 (C. C. W. D. Mo. W. D.), are all cases where a corporation objected to the service because it was not doing business in the state. In such cases, of course, the marshal's return was held not conclusive, because the defendant was never within the boundaries of the sovereign. Territorial jurisdiction had not attached.

The following quotation from Foster's Federal Practice, section 167a, was relied upon by appellant in the court below:

> "If the marshal or his deputy make the service, his unverified return is sufficient. This may be contradicted, although there is a remedy by an action against the officer for a false return. The marshal's return, that the corporation served was transacting business within the district, can be contradicted; so can his return that the person on whom the service was made was authorized to represent the defendant for that purpose."

This quotation is based on the federal authorities discussed *supra*, and on some other cases not in point. We submit that the cases cited do not sustain the broad language of the text. The language must be limited.

Bradley v. Burrhus, 135 Iowa 324, was relied on by appellee in the lower court as directly in point. It is in point on the facts, but the question of the conclusiveness of the marshal's return does not seem to have been raised or discussed.

Many other cases could be cited for the rule, and some against it. Some of the cases departing from the strict rule of conclusiveness will be found under Point I. B. The authorities cannot be reconciled, but we submit that the rule of conclusiveness is the better one, because:

1. On a balance of interests, the necessity of speedy justice for the majority of litigants outweighs

the inconvenience of slow justice to the few in the rare case of a false return.

2. The records of the court import verity.

3. The return of the court's sworn officer should be conclusive.

4. The rule of conclusiveness tends to make the marshal careful.

5. The danger of subjecting judicial records to the slippery memories of interested witnesses is too great.

6. The defendant has his remedy by an action for a false return against the marshal.

B. *If the court refuses to adopt the rule of conclusiveness of the marshal's return as urged by appellant under Point I. A., it should at least adopt the rule in a modified form. Where territorial jurisdiction is admitted, and the marshal's return is complete and self-supporting on its face, the court should not vacate the decree founded on that return, unless the defendant shows absence of laches and a meritorious defense and offers to waive the statute of limitations, and come in to defend.*

Appellant believes that the rule should be established by this court that wherever the marshal's return is complete and self-supporting on its face and territorial jurisdiction is admitted, the return is conclusive. If the court does not agree with appellant, we believe that the court should adopt the rule in a modified form.

A defendant comes into court, as in this case, and attacks a record faultless on its face. There is a valid decree and a complete and self-supporting return of service on which to found it. But, says the defendant, the return of the court's officer is untrue; no service was in fact made upon me. To this the court should answer: The face of the record shows you were served. We will not go off the face of the record, unless you show us that you moved promptly as soon as you had knowledge of the suit, and unless you show a meritorious defense which you wish to set up, and offer to waive the statute of limitations.

In the case at bar defendant is attacking a record flawless on its face. If he wishes the court to go off the record, he should present equitable grounds to justify it in so doing. We submit he has not done so. His motion and affidavits will be searched in vain for any statement that he has a meritorious defense, or for any request to set it up. On the contrary, he asks the court not to open the decree, but to vacate it. He makes no offer to waive the statute of limitations.

Nor does he show lack of knowledge of the suit. The order *pro confesso* was entered October 12, 1923. [Tr. 221.] The motion was made April 15, 1925. [Tr. 151.] We believe that it is perfectly apparent even on the defendant's own showing that Jasper Thomason had notice of the suit and was in touch with it at all times.

In his affidavit Jasper Thomason carefully refrains from saying that he had no notice of the suit, nor does he say that the subpoena was not delivered to him. He simply says that neither the marshal nor his deputy delivered the subpoena to him. [Tr. 153.] Rosamond Mildred likewise in her first affidavit confines herself to the statement "and that the said copy of subpoena was not, nor was any copy thereof, so far as affiant knows, delivered by the said Walton to her father, Jasper Thomason." [Tr. 158.] In a later affidavit she says that "she verily believes the said subpoena never came into the possession of her said father at any time." [Tr. 259.] Mrs. Thomason says in a later affidavit (not in the one filed with the motion):

"That affiant never saw the said subpoena so attempted to be served nor did she ever know of its delivery by any person to the defendant, Jasper Thomason, but affiant verily believes that the said subpoena was not delivered to him, nor did it ever come into his possession." [Tr. 308.]

On defendant's own showing then it nowhere appears that Jasper Thomason had no notice of the suit. Nor does it appear, except from the "belief" of his wife and daughter, that he never received the subpoena.

It seems clear that Thomason knew all about the suit. His family was involved in it. His son-in-law was the one who conceived the conspiracy. [Tr. 102, 228.] His daughter made the false affidavit of service. [Tr. 66, 67, 128.] Rosamond Mildred talked over her interview with the marshal, according to her story, with her sister, Mrs. Davis, and her aunt. [Tr. 299.]

It must have been the subject of family discussion. On August 26, 1923, Mrs. Davis and Jasper Thomason, her father, went on a six weeks' automobile trip to Reno, Nevada. [Tr. 254, 255.] This was after Walton's service. Mrs. Davis was a witness at the trial. She testified that her husband was in Mexico, and her father was somewhere in Kern county, at a location which no one knew, but that she had talked to her father during the previous week. [Tr. 250, 251.] So much for Thomason's knowledge.

So we have this case. The defendant seeks to set aside a decree, based on a return complete and self-supporting on its face, with territorial jurisdiction admitted. He makes no effort to show lack of knowledge or due diligence. It appears from a fair reading of the record that he had knowledge. He makes neither a showing of a meritorious defense, nor a request to defend. He does not offer to waive the statute of limitations. He says in effect:

"Set aside the decree. If I am sued again, I'll plead the statute of limitations. I am not asking the court to open the decree and to let me defend. Although I am in a court of equity, I am standing on my strict legal rights. No valid service was made on me, for it is nominated in Equity Rule 13 that the person served must be eighteen, and my daughter lacked eight months of being eighteen. The court, therefore, has no jurisdiction over my person. What I knew is immaterial. Whether I have a meritorious defense is immaterial. Whether the statute of limitations has run is immaterial. The decree is void, and must be vacated."

To this the court should reply:

"You are mistaken. The decree is not void. On its face it is regular in every respect, and the return on which it is based is complete and self-supporting. To prove otherwise you must impeach the verity of the return by evidence *dehors* the record. In support of your right to do so, you must invoke the fact that it would be unjust and inequitable not to permit you to show the return is false. Every party, you say, is entitled to his day in court. But we ask you who ask justice, are you willing to grant it? You do not show a meritorious defense. You do not show diligence. You do not ask for your day in court. You ask in effect to put the statute of limitations between you and justice. In such a case, we will not go off the face of the record."

If a defendant is to be permitted to impeach a decree supported by the sworn return of an officer of the court, self-supporting on its face, where territorial jurisdiction is granted, he should be allowed to do so only where he has shown due diligence, and has a meritorious defense which he asks to set up.

No argument has ever been made against the rule of conclusiveness except the injustice of denying a man his day in court. When he is not asking for his day in court, and not asking for justice, but is petitioning the court to place the statute of limitations between him and plaintiff's just cause of action, the rule of conclusiveness should certainly be applied.

In this connection, we wish to point out another reason why cases where there is no territorial juris-

diction are an exception. In such case the defendant has not only a right to his day in court, but also the right to be sued in his own court. He should not be required to defend in the courts of another jurisdiction.

The rule of conclusiveness in the absence of a showing of meritorious defense and due diligence, in other words, where defendant is not in good faith seeking his day in court, has been well set forth in two well-reasoned Arkansas cases.

In *St. Louis etc. Ry. Co., Ex Parte* 40 Ark. 141, a default judgment was rendered against the defendant. It sought to quash the judgment by showing that the person served was not its agent, in contradiction of the sheriff's return. The court held that it could not do this, saying at page 143:

> "The sheriff asserts that he left a copy of the writ with Kenna, and that Kenna was then the agent of the defendant. If this was not so, the remedy is by action against the sheriff for a false return. But the truth of the return could not be controverted either in that action or in a review upon certiorari."

In *Wells Fargo & Company v. Baker Lumber Co.,* 107 Ark. 415, 155 S. W. 122, the defendant sought leave to be let in to defend, after a default, alleging no notice, due diligence, and a meritorious defense. For this purpose defendant sought to contradict the sheriff's return. The court said at pages 422 and 423:

> "It is also true, this court held in *Ry. Ex Parte,* 40 Ark. 141, in a case of a default judgment, that

the truth of the sheriff's return upon a copy of the writ could not be controverted either in the action or in a review upon *certiorari.*

"But it has further held, however, that an officer's false return of service of process shall not preclude the defendant from showing the truth in a proper proceeding to be relieved from the burden of a judgment based thereon.

" 'Evidence tending to contradict the record is heard in such cases, not for the purpose of nullifying the officer's return but to show that by the judgment the defendant has been deprived of the opportunity to assert his legal rights without fault of his and that it would be unfair to allow the judgment to stand without affording him the chance to do so. The principle that affords relief to one that has been summoned, but has been prevented through unavoidable casualty from attending the trial governs.' *State v. Hill,* 50 Ark. 461; see, also, *Kolb v. Raisor,* 47 N. E. 177; *Locke v. Locke,* 30 Atl. Rep. 422; *Cook v. Haungs,* 113 Ill. App. 501; *Clough v. Moore,* 63 N. H. 111; *Carr v. Bank,* 16 Wis. 52.

"Appellant was not entitled to show the falsity of the officer's return to defeat the jurisdiction of the court rendering the judgment under the doctrine of the cases above cited, but only to excuse its failure to make its defense at the time of the trial and prevent its being compelled to submit to a judgment and have its rights unjustly concluded without an opportunity to be heard.

"The testimony is well-nigh conclusive that the summons was not served upon an agent of the express company, as the return shows it to have

> been, both persons who had been agents denying that it was served upon them and the sheriff not being able to say upon whom it was served; but only that he delivered the copy to a man who said he was agent, whom he could not identify as either man who had been agent there, and the testimony shows further that the company had no notice in fact of the bringing of this suit, nor the service of summons, and that as soon as it had information that a default judgment had been taken against it, immediately and without delay, shortly thereafter, and at the same term of the court, it moved to set aside the judgment and that it have an opportunity to make its defense to the suit, which was alleged to be a good one." (Italics ours.)

It will be readily seen that these two cases lay down a modified rule of conclusiveness. When the defendant is seeking to set aside the judgment and is standing on his strict legal rights, there is no reason to relax the common law rule of conclusiveness. The only possible reason for relaxing it is the injustice of defendant not having his day in court. But when he is not seeking his day in court, let the record stand. If, however, the defendant, who has used diligence, is seeking his day in court, the court will ascertain whether the record speaks the truth.

The same distinction is drawn by the Indiana cases.

In *Nichols v. Nichols,* 96 Ind. 433, the court laid down the absolute rule of conclusiveness, saying at 435:

"A complaint to set aside a default and judgment, in order to be good, must specifically allege a defense; a general charge that the complaint, in relation to the land, 'was wholly wrongful and without any foundation,' is not sufficient. *Lake v. Jones*, 49 Ind. 297; *Bristor v. Galvin*, 62 Ind. 352; *Slagle v. Bodmer*, 75 Ind. 330; *Lee v. Basey*, 85 Ind. 543. But there is a more fatal objection urged to this complaint; it seeks to contradict the return of the sheriff upon the summons. This can not be done. The return of the sheriff of service upon the summons is conclusive against the defendant in the action."

In *Neitert v. Trentman*, 104 Ind. 390, 4 N. E. 306, the Supreme Court of Indiana departed from the absolute rule of conclusiveness and adopted the modified rule. There the defendant sought to set aside a default judgment by contradicting the sheriff's return. He alleged due diligence and a meritorious defense, which he asked leave to assert. The court limited *Nichols v. Nichols* to a case where defendant was seeking to defeat the jurisdiction, and refused to apply it to a case where defendant sought to make a defense. The court said at 308:

"If a default may be taken against a defendant who has not been really served with summons, upon a false return of the sheriff, and if such want of actual service of the summons cannot be urged as a reason for setting aside the default, then injuries may be inflicted upon defendants in many cases for which an action against the sheriff would afford no adequate remedy. The object of this proceeding is neither to set aside the service

of the summons, nor to question the jurisdiction which the Circuit Court acquired over the appellant in virtue of the sheriff's return, but is simply and only to have a default, taken against the appellant during the progress of the cause, set aside upon the ground that, up to that time, he had no actual knowledge of the pendency of the action against him, and that hence his neglect in not appearing in time to make his defense was excusable. The facts averred constitute what appears to us to be a well-sustained case of excusable neglect on the part of the appellant."

Two judges dissented in favor of the absolute rule of conclusiveness. After reargument the court stuck to its position, the two judges again dissenting.

See, also:

Groff v. Warner, 89 N. E. 609 (Ind. App.).

Shepherd v. Marvel, 45 N. E. 526 (Ind. App.), draws the same distinction.

In Cully v. Shirk, 30 N. E. 882 (Ind. Sup.), defendant sought to vacate the judgment by contradicting the sheriff's return, not to make a defense. The court reaffirmed the doctrine of *Nichols v. Nichols* and limited *Neitert v. Trentman* to a case where defendant was seeking to defend.

In *Angell v. Bowler,* 3 R. I. 77, and in *Locke v. Locke,* 30 Atl. 422, the Rhode Island court drew the same distinction. The sheriff's return is conclusive when defendant seeks to contest the jurisdiction; it is

otherwise when a diligent defendant seeks his day in court.

In *Cooke v. Haungs*, 113 Ill. App. 501, the court said at pages 501 and 502:

> "Mr. Justice Baker delivered the opinion of the court.
>
> "At the September term, 1902, of the Circuit Court, appellee entered the default of appellant and obtained a final decree against her and others for a mechanic's lien for $176. Appellant at the same term moved the court to set aside the default and vacate the decree as to her and grant her leave to plead, demur or answer. In support of her motion she filed several affidavits from which it clearly appeared that the person with whom a copy of the summons was left for appellant was not a member of the family of appellant, nor was such copy left at the usual place of abode of appellant, as stated in the return of the sheriff, and that appellant had no knowledge of such attempted service until after the decree was entered and then promptly moved to vacate the same. The court continued the hearing of appellant's motion to the October term and then denied it and from the order denying the motion this appeal is prosecuted.
>
> "The strict rule of the common law as to the conclusiveness of the return of service of summons or other process, by a sheriff or other officer, has been somewhat relaxed. In Scrafield v. Sheller, 18 Ill. App. 507-506, Mr. Justice McAllister said: 'We hold that while the officer's return cannot be contradicted so as to defeat jurisdiction, yet it may be done to excuse a default.' "

In *Massachusetts Benefit Life Ass'n v. Lohmiller,* 74 Fed. 23 (C. C. A., 7th Cir.), complainant corporation brought a bill in equity seeking to enjoin the enforcement of a judgment at law and to have it declared void because of the fact that service was not upon a person who was its agent and also upon the ground of fraud. The return showed good service. The bill failed to aver due diligence and a meritorious defense. The court first pointed out that the bill was bad because it did not aver lack of knowledge. The court went on at pages 28 and 29:

> "The bill is silent in another respect, of which these principles of equity generally require clear expression before relief can be extended. There is no impeachment of the cause of action upon which the judgment was rendered, nor suggestion of defense in whole or in part; and, for all that appears in the record, the policy of life insurance referred to in the bill, and set out in the answer, is an undisputed and matured obligation against the complainant, and justly enforceable as adjudged. If that is the true situation, interference would serve only 'the unworthy purpose of delaying, vexing and harassing suitors at law in the prosecution of their just demands,' so pertinently denounced in Truly v. Wanzer, *supra.* It furthermore appears from the terms of the policy that it limits the time within which suit may be brought thereon, and that such time has expired. There is no suggestion in the bill of any waiver of the limitation, and, unless waiver were imposed by the court as a condition of interference, the right of action would probably be barred. The rule is in-

variable that equity will not enjoin a judgment procured through fraud or artifice unless the complainant can 'aver and prove that it had a good defense upon the merits.' White v. Crow, 110 U. S. 183, 187, 4 Sup. Ct. 71, citing Ableman v. Roth, 12 Wis. 81, and other cases; Freem., Judgm., §498; 1 High, Inj., §228. Ableman v. Roth, *supra,* is a leading case upon this subject, and Chief Justice Dixon there says:

" 'Courts of equity will not interfere to grant a new trial where no substantial right has been lost, and no unfair advantage gained, simply because, by some trick or artifice, a judgment which is just and equitable in itself has been obtained in advance of the time when it would otherwise have been rendered.'

"The authorities are not in unison in holding the same rule where the judgment was obtained without service of process, and where the defendant had no opportunity to be heard. In some jurisdictions it is maintained that the defendant will not be required to show a good defense in such case, the judgment being void, and the reasons therefor are variously stated, namely, that 'there is no presumption in favor of the judgment creditor,' and 'neither reason nor sound policy will require a defendant so imposed upon to try the merits of the cause on a petition in chancery to set aside the judgment'; 'that the injury of which he justly complains is that a judgment was rendered against him without notice and without defense.' Blakeslee v. Murphy, 44 Conn. 188; Ridgeway v. Bank, 11 Humph. 523; Bell v. Williams, 1 Head 229; Finney v. Clark, 86 Va. 354, 10 S. E. 569. And in Dobbins v. McNamara, 113

Ind. 54, 14 N. E. 887, and Magin v. Lamb, 43 Minn. 80, 44 N. W. 675, the same view is held, but apparently grounded upon the rule which there governs in the law courts to open such judgments without inquiry into the merits. The preponderance of authority in the state courts is, however, the other way, and upholds the rule 'that equity will not interfere until it appears that the result will be other or different from that already reached.' Freem., Judgm., §498; Taggart v. Wood, 20 Iowa 236; Gerrish v. Seaton, 73 Iowa 15, 34 N. W. 485; Stokes v. Knarr, 11 Wis. 389; Harris v. Gwin, 10 Smedes & M. 563; Stewart v. Brooks, 62 Miss. 492; Secor v. Woodward, 8 Ala. 500; Dunklin v. Wilson, 64 Ala. 162; State v. Hill, 50 Ark. 458, S. W. 401, disaffirming Ryan v. Boyd, 33 Ark. 778; Gifford v. Morrison, 37 Ohio St. 502; Wilson v. Hawthorne, 14 Colo. 530, 24 Pac. 548; Sharp v. Schmidt, 62 Tex. 263; Pilger v. Torrence, 42 Neb. 903, 61 N. W. 99; Colson v. Leitch, 110 Ill. 504. No such exception to the general rule appears to have found recognition in the practice of the federal courts, and its incorporation would not harmonize with the principle that equity will not enforce rights upon grounds which are wholly legal or technical, nor 'grant an injunction to stay proceedings at law merely on account of any defeat of jurisdiction of the court.' 2 Story, Eq. Jur., §898."

It would seem clear that the same principle would restrain a court of equity from setting aside its own decree based on a sufficient return without a showing of diligence, a meritorious defense, and a waiver of limitations.

Massachusetts Benefit Life Assn. v. Lohmiller was cited with approval by this Court in *Cowden v. Wild Goose Mining & Trading Co.,* 199 Fed. 561, 565, in a case where this court also required a showing of due diligence, even where the agent who received the service was not the agent of the corporation authorized to receive service.

In this connection we wish to call attention to the fact that *Blythe v. Hinckley,* 84 Fed. 228 (C. C., Cal.), *supra,* so heavily relied on by the defendant in the court below, was not a motion to vacate but to be let in to defend. Judge Morrow said at page 246:

> "But this doctrine does not control the discretion of the court in opening a decree obtained by default for the purpose of permitting a defense on the merits. Indeed, it has been held 'that a meritorious defense and a reasonable degree of diligence in making it are all that it is necessary to establish, in order to justify the setting aside of an interlocutory judgment.' Adams v. Hickman, 43 Mo. 168."

See, also, the attitude taken by the Supreme Court in *Martin v. Gray,* 142 U. S. 236.

In *Gregory v. Ford,* 14 Cal. 138, the California court laid down the same principle. A bill was filed to vacate a judgment because of a false return. The court refused relief because there was no showing of a meritorious defense. The court said at page 142:

> "The case then on the pleadings and proofs resolves itself into this proposition of law: Can a defendant having no defense to an action, enjoin

a judgment by default obtained on a return by the sheriff of service of process, upon the ground that the return is false; that in fact he had no notice of the proceeding? It is difficult to see upon what principle chancery would interfere in any such case in favor of such a defendant. In analogy to its usual course of procedure, it would seem that the plaintiff, having acquired without any fraud on his part, a legal advantage, would be permitted to retain it as a means of securing a just debt; and that a court of equity would not take it away in favor of a party who comes into equity acknowledging that he owes the money, and claims only the barren right of being permitted to defend against a claim to which he had no defense. It would certainly seem that it would be quite as equitable to turn the defendant in execution over to his remedy against the sheriff for a false return, under such circumstances as to relieve him from the judgment and turn the plaintiff for redress to the sheriff. For the effect of vacating the judgment now, would be to release the defendant from the debt, as the statute of limitations has intervened. Courts of equity do not interfere with the judgments and proceedings of the courts of law, except in peculiar cases. They do not interpose to correct the errors of irregularities of the law courts.

* * * * * * * *

"A court of chancery, too, looks well to the consequences of its acts, and the case must indeed be a strong one, which would induce it to nullify a judgment at law, and thus, as here, put it in the power of a debtor to plead the statute of limitations to a debt, which he does not deny to be justly due."

Gregory v. Ford was cited with approval as late as 1920 in *Hawley v. State Assurance Co.,* 182 Cal. 111, 113, where it was sought to set aside a decree of foreclosure based on a false return and an unauthorized appearance. The court refused to set aside the decree in the absence of a showing of a meritorious defense, citing many cases in support of its position.

See, also:

State v. Hill, 50 Ark. 458.

In *Hilton v. Thurston,* 1 Abb. Prac. (N. Y.) 318, the same rule is asserted. The court in speaking of a defendant's delay after knowledge, said:

> "Such a course the court will not countenance. It has long been the established practice of the court that a party must make his application at the earliest practicable opportunity after the irregularity of which he complains has taken place, and not knowingly suffer further proceedings to be taken."

We now turn to a review of the cases cited by appellee in the court below. On examination we believe none of these cases will sustain the position appellee must take in order to sustain the order setting aside the decree. Appellee must contend that a court of equity on motion of the defendant will set aside a decree rendered by it, which is supported by a return by a sworn officer of the court, complete and self-supporting on its face, with territorial jurisdiction admitted, on the ground that the return is false:

1—without defendant's asking leave to make a meritorious defense, and

2—without a showing of a meritorious defense, and

3—without a showing of due diligence, and

4—where knowledge of the suit, and inaction, nevertheless, affirmatively appears, and

5—without any waiver of limitations.

In *National Metal Co. v. Greene Consolidated Co.*, 11 Ariz. 108, it is held that a foreign corporation not doing business in the state can enjoin the enforcement of a judgment for lack of service upon it, even though the return of the sheriff showed service. Of course, this is a case where there was no territorial jurisdiction and in such case the return of the sheriff has never been held conclusive. Moreover, the complaint seeking the injunction showed due diligence and a meritorious defense.

Wilmer v. Pico, 118 Md. 543, was a garnishment case. The defendant garnishee evidently was acting in good faith in the case and asked an injunction against the garnishment *because she did not owe anything.* She knew of the garnishment, but her daughter was assured by the justice of the peace who issued the writ and who had offices with the plaintiff in the principal suit that nothing need be done. She offered to show that she owed nothing and made a showing of diligence. The injunction was granted.

In *Caldwell v. Glenn*, 6 Rob. (La.) 9, there was no service of a proper citation. *This showed on the face of the record.* The court held that the court below should not have given judgment but should have issued a new citation.

In *Osborne v. Columbia Co. Farmers' Alliance Corp.*, 38 Pac. 160 (Sup. Ct. of Washington), service was made on the wrong agent of a domestic corporation. It was held that the corporation could set the judgment aside though it knew of the suit. The court said that the defendant was not guilty of laches since it made application in the time provided by statute and on one of the grounds provided by statute. *What the return was does not appear nor whether there was an attack on the return. Moreover, it does not appear whether or not the defect was apparent on the face of the record.*

In *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, the X corporation was garnishee in an action. The return of the sheriff showed service on A, secretary of the X corporation. There was a judgment by default against the garnishee. The corporation brought an action to set aside the judgment. The petition alleged that the writ of garnishment was not served upon the corporation as the return showed because A was not the secretary of the X corporation. *That the X corporation had no notice of judgment until long after the term of court at which it was returned and that the corporation had a meritorious defense. The question*

of the conclusiveness of the return was not raised. The X corporation succeeded in maintaining its suit. The court did say, in the course of its opinion, that knowledge of the pendency of the former suit was immaterial. It will be noticed, however, that the X corporation alleged a meritorious defense and that the question of the conclusiveness of the return was not raised.

In *Bradley Mfg. Co. v. Burrhus,* 135 Iowa 324, there was a motion to set aside a false return. The court said that knowledge of the suit was immaterial. But there the defendant tendered with his motion to set aside the default an answer on the merits, which he prayed leave to interpose. Moreover, the question of conclusiveness was not discussed.

In *Savings Bank of St. Paul v. Authier,* 52 Minn. 98, the return showed good service. The defendant made a motion supported by affidavit from which it appeared that there was no service at all. The court set aside the judgment and gave the defendant five days to answer on the defendant's filing bond conditioned on his paying the judgment if he lost, the judgment meanwhile to stand as security. Plaintiff appealed. The upper court affirmed. The court said that the lower court could have set aside the judgment without a showing of a meritorious defense and without the imposition of any conditions. Since it imposed conditions in the plaintiff's favor, he could not complain. No point, however, was raised as to the conclusiveness of the return.

In *Wilcke v. Duross*, 144 Mich. 243, plaintiff filed a bill in equity which seems to have had for its object making a defense in a suit in which there had been a default judgment. The constable's return showed good service. It appeared, however, that the service was made on a daughter of the defendant by the same name. Defendant had knowledge of the suit and did nothing about it. Defendant, however, did allege a meritorious defense. The court held in favor of the plaintiff. No point of conclusiveness was raised. The court denied costs because of the defendant's knowledge and seemed reluctant to reach the result which it seemed to think it was compelled to reach. No doubt had the point of conclusiveness been presented, the case would have gone the other way.

O'Connell v. Gallagher, 104 App. Div. (N. Y.) 492, is not in point because there service was not made by an officer of the court.

In *Kochman v. O'Neill*, 202 Ill. 110, the bill asked for a trial on the merits, averred a meritorious defense, and showed an absence of laches. The court accordingly granted the relief prayed, namely, that the defendant should be allowed to have a trial on the merits.

It seems apparent that the only possible argument against the rule of conclusiveness of the return is that the defendant is entitled to his day in court. When he is not asking for his day in court, and does not aver a meritorious defense and due diligence, it seems apparent that the only reason against the rule falls.

He is asking the court to do an injustice by putting the statute of limitations in the way of plaintiff's just demand. Accordingly in such a case, we submit the rule of conclusiveness should always be applied.

II.

Even if the Court refuses to adopt the rule of conclusiveness, the evidence was insufficient to rebut the Marshal's return supported by his affidavit. Certainly it should not have been impeached without an oral hearing, and an opportunity for cross-examination.

Even if the court declines to adopt the full or modified rule of conclusiveness, nevertheless, the evidence was insufficient to justify setting aside the return.

Even in states where the return may be impeached, it is held that the "strongest" testimony is necessary to overthrow it. So in *Davant v. Carlton*, 53 Ga. 491, the code had abolished the rule that the sheriff's return was conclusive, and had made it subject to traverse. The Supreme Court of Georgia held it was error to refuse to charge the jury that under the law it required the "strongest" evidence to overcome the effect of the sheriff's return, and to charge in lieu thereof that the sheriff's return was *prima facie* evidence, but like other presumptions, it might be rebutted by proof. The Supreme Court said at page 492:

> "It should only be set aside on very satisfactory proof of its incorrectness. It should require the strongest testimony to rebut it."

With this in mind, let us examine the record.

Of course, in an equity case, the appellate court has the whole case before it, and will review the facts as well as the law. (*La Abra Silver Mining Co. v. United States,* 175 U. S. 423, 464, 465, 466.) This is especially clean on this appeal where there was no oral testimony and the judge who set aside the decree was not the judge who heard the case.

We admit that the return of May 13, 1921, and the amendment of October 4, 1923, supported by the deputy marshal's affidavit of October 5, 1923, shows that service was made on *Miss* Thomason. But that is explained clearly in the deputy marshal's later affidavit. [Tr. 274-279] which is quoted in full in the Statement of Facts. (Brief pp. 18-22.) The clarity of that affidavit leaves no doubt of his memory of the incident. In the court below, counsel for appellee made much of the fact that at one time the deputy marshal swore he served Miss Thomason and at another time, the married daughter. But his mistake (and he says it was a mistake) is easily explainable. His mind was directed to the fact that he must serve Thomason, that the person who took the subpoena was an adult, and that she was Thomason's daughter who lived with him. He did not have in his fore-consciousness the question of Miss or Mrs. In his last affidavit [Tr. 274-279] he says May 9, 1921, instead of May 13, 1921, and defendant made much of the fact. On May 9 he received the affidavit and on May 13 he served it. The mistake is purely typographical, as appears from the rest of the affidavit.

Inconsistencies in affidavits happen to the most honest of men. We do not question the integrity of Mr. Ashburn, counsel for appellee. We do not believe he will deny that he prepared all the affidavits made by Rosamond Mildred Hunt, after talking to her, of course. In her affidavit of April 7, 1925, she says Walton "delivered to her a copy of the alias subpoena" [Tr. 158]. In her affidavit of April 26, 1925, she says she never received the subpoena, and that there was a screen door between the marshal and her. [Tr. 258, 259.] Both affidavits were made in the same month.

The deputy marshal tells a straight and convincing story. *He had no interest in lying.* And he says: *"I could without difficulty identify the person upon whom the service was made."* [Tr. 278.] *In the lower court, over and again we demanded an oral hearing.* We were willing to put Walton's statement to the test. We were willing that he should be cross-examined.

What was the attitude of appellee? Jasper Thomason was too ill. He was even too ill to make any affidavit after the first one. It seems to run in the family to have something happen, when it comes time to go on the witness stand. Mrs. Davis' husband had important business in Mexico at the time of the trial, although he was a defendant charged with dastardly crimes and frauds. He, an attorney, under such grave accusations, felt the need of the Mexican air. Jasper Thomason, also suddenly felt the need of going to parts unknown in Kern county. It seems to be a family failing.

If Thomason was ill, he could have been excused on testimony by a physician, or have awaited a continuance until he got well. He had delayed from 1921 to 1925. He might have been willing to tarry a little longer. But, no, the anxiety of awaiting a decision was killing this man who had already waited four years to move.

However, the rest of the family was not sick. Why their reluctance to submit to cross-examination if they were telling the truth? We submit with confidence that the affidavit of the deputy marshal, who had no interest in the matter. and who wanted to take the stand, is worth more than the whole sheaf of interested affidavits from this family, steeped in fraud, and avoiding cross-examination; that their reluctance to be cross-examined makes their testimony fall short of the "strongest" evidence that is necessary to overthrow a return.

Let us examine their affidavits.

Rosamond Mildred Hunt, formerly Thomason, made three affidavits. In the first one [Tr. 157, 158] she says the deputy marshal delivered her the subpoena. In the second affidavit [Tr. 258-259] she says he did not deliver her the subpoena. She also says in the second affidavit that she told the marshal her father "would probably be at home soon." [Tr. 259.] It appears that this took place in Santa Monica. In her third affidavit [Tr. 297-301], Rosamond says that her father was at the time in Antelope Valley [Tr. 298].

She also says in her third affidavit that she told the marshal that her father was out of town. [Tr. 298.] There is one thing, however, which clearly stamps her affidavits as false; she proves too much. She says she told the marshal at the time of service that she was a minor, only seventeen years old. [Tr. 259, 299.] In other words, she does not alone accuse the deputy marshal of making a mistake; she says he made a deliberately false return. This is unbelievable. The deputy marshal had no interest in the matter. He knew Thomason was evading service. Why should he play into his hands by serving Rosamond if she told him she was a minor? Will the court believe that its sworn officer deliberately made a false return in a matter in which he had no interest? The question answers itself. This departure from the truth by Rosamond (and it can be nothing else) makes her testimony entirely incredible.

Meryle Thomason Davis made three affidavits. [Tr. 253, 260, 302.] In her first affidavit, she says and attempts to show in detail how Jasper Thomason did not evade service of any subpoena, yet the deputy marshal says that three other deputies had failed to serve the subpoena *ad respondendum* on Thomason [Tr. 275]. Mr. Lewinson said he employed the Pinkerton National Detective Agency to attempt to subpoena Thomason as a witness on the trial. "Said agency employed numerous operatives to locate said Thomason and serve said subpoena, but said Thomason evaded process." [Tr. 250.] The same Meryle Thomason Davis, who in her affidavit shows that

Thomason did not evade service, testified at the trial that Thomason was in parts unknown of Kern county, but that she had talked to him the week before [Tr. 250, 251]. This same lady was found guilty by the court of having made a false affidavit of service on plaintiff and of other frauds. [Tr. 228.] In her next affidavit she sets forth her testimony at the trial on the subject of her sister's age. [Tr. 260-267.] She testified, as Mr. Lewinson said she did in his affidavit, as to her sister's age under examination by Mr. Lewinson, namely, that her sister was of age. That she changed her testimony after talking to her solicitor during the recess does not alter the situation.

When all of the affidavits are boiled down, the issue comes to just this. The marshal says he served the married daughter. He is willing to go on the stand and pick her out. He is willing to be cross-examined. Is the countervailing evidence strong enough to convince the court he is lying, and to cause it to overthrow his return?

Rosamond Mildred Hunt, Meryle Thomason Davis, and Mrs. Harris, their aunt, contradict the marshal. Mrs. Jasper Thomason also does in some particulars. All these witnesses are interested. Meryle Thomason Davis' affidavit, in view of the facts previously reviewed herein, is worth no more than waste paper. Rosamond's is little better.

Even though these witnesses are interested, their testimony *might be* sufficient to overthrow the return and the marshal's testimony were it not for the facts

we have pointed out and their strange reluctance to go on the stand. We call the court's attention to the repeated efforts of appellant to get an oral hearing in the lower court, and appellee's strong resistance thereto. Appellee argued that all appellant could show by cross-examination was that Thomason received notice of the suit, and that was immaterial. Counsel for appellant wished to cross-examine these witnesses to show that they were telling a tissue of lies.

We submit that the evidence is not the "strongest" evidence which is necessary to overthrow a marshal's return.

Moreover, that return certainly should not have been overthrown on affidavits. Appellant should have been given an opportunity to subject these witnesses to the acid test of cross-examination. If a return is to be overthrown by family affidavits, any dishonest family can always come in and swear a plaintiff out of court. Cross-examination, however, will usually expose the truth.

Appellee cited, in the court below, *Peper Automobile Co. v. American Motor Car etc. Co.,* 180 Fed. 245 (C. C. Mo.) as authority that appellant did not have the right to a jury trial on the question of service. We are not so contending. We maintain that in this case, where a return, perfect on its face, supported in addition by the affidavit of the deputy marshal, was sought to be overturned by the affidavits of the family of the defendant, several members of which family had been found guilty of fraud, that the plaintiff

should have had the opportunity of applying the test of rigorous cross-examination to the family testimony.

Before passing this point, one other matter may be briefly discussed. In the lower court, counsel for appellee made much capital of the fact that when Mr. Lewinson was examining Mrs. Davis at the trial, he stated Mr. Walton was in Seattle, but the same day at noon, Mr. Walton amended his return. Mr. Lewinson was so informed when he made the statement, but went into the marshal's office at noon and found Walton had returned.

We submit:

(1) That the testimony adduced to overthrow the marshal's return was not the "strongest" testimony necessary so to do.

(2) That certainly the return should not have been overthrown without an oral examination, and an opportunity for cross-examination.

III.

Even if we admit that the subpoena was delivered to Rosamond Mildred Hunt (formerly Thomason), as contended by appellee, and not to Meryle Thomason Davis, as contended by appellant, there was still a compliance with Equity Rule 13. The words "adult person" in Equity Rule 13 mean a "matured person" not a person of legal age.

Equity Rule 13 provides as follows:

"The service of all subpoenas shall be by delivering a copy thereof to the defendant person-

ally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family."

In Rosamond Mildred Hunt's first affidavit filed with the motion to vacate, she swore that the deputy marshal delivered to her a copy of the subpoena. [Tr. 158.] In a later affidavit, she said she never received the subpoena, and that there was a screen door between the marshal and her. [Tr. 258, 259.] The deputy marshal swears positively that he delivered the affidavit to the person with whom he talked. [Tr. 276.] There is no corroboration for Rosamond's story. Mrs. Harris, her aunt, swears that from her house across the street she saw the deputy marshal talking with Rosamond, and that the screen door was closed. She says she saw the man go away, but does not say that she saw him approach, or that she "saw" the whole conversation. [Tr. 305, 306.] Moreover, she says that she did not see what the marshal did with the subpoena. [Tr. 306.] For aught that appears from her affidavit, therefore, the deputy marshal may have handed Rosamond the subpoena before Mrs. Harris began to witness the interview from across the street.

Of course, what Rosamond told Mrs. Davis and Mrs. Harris afterwards about what happened is the rankest kind of hearsay, clearly incompetent, and must be disregarded. It is a good example of testimony by affidavit.

So, as the record stands, we have only Rosamond's conflicting affidavits as to delivery against the marshal's affidavit. It needs no argument to demonstrate that a return will not be overthrown on that kind of evidence.

Moreover, the defendant's notice of motion to quash says that "the only service or attempted service of subpoena herein was made by leaving a copy thereof with Rosamond Mildred Thomason on the 13th day of May, 1921, at a time when the said Rosamond Mildred Thomason was under the age of 18 years and was not an adult person." [Tr. 151.] The same language is used in the motion to quash as a ground of the motion. [Tr. 236.] The words "leaving a copy" are the words of Equity Rule 13.

So it is clear on defendant's own showing that a copy of the subpoena was left with Rosamond. It is not disputed that a copy was left at the dwelling-house and usual place of abode of Jasper Thomason. It is admitted that Rosamond at the time was a member of and resident in Jasper Thomason's family. On her own statement she was seventeen years and four months old. Defendant made no attempt to show that Rosamond at the time had not arrived at maturity or that she had not attained full size and strength, and there is no evidence to that effect in the record. Defendant was content to show that Rosamond had not reached her eighteenth birthday.

Accordingly, on defendant's own showing, there was a full compliance with Equity Rule 13, if the adjective

"adult," as used in the rule, means "matured" rather than "of full age."

Webster's New International Dictionary defines the adjective "adult" as follows:

> "Having arrived at maturity, or attained full size and strength; matured; as an *adult* person or plant; an *adult* age."

Clearly the definition is with reference to the use of the adjective in Equitv Rule 13; namely, "an adult person." Of course, an examination of the rule shows that the word "adult" is used as an adjective therein.

In the same dictionary, the noun "adult" is defined as follows:

> "A person, animal or plant grown to full size and strength; one who has reached maturity. In the common law the term is applied to persons of full age; in the civil law to males over the age of fourteen and to females after twelve; in the Mohammedan law of India to males or females over the age of fifteen."

It will be readily seen by reading the two definitions together, that the noun "adult" may mean either one who has reached maturity, or one of full age, but that the adjective "adult" especially when used to modify "person," means "matured" and does not mean "of full age." Since the rule says "adult person" and not "adult" it means "matured person" and not a "person of full age."

It is a well-settled principle of construction that statutes are to be construed in the light of the ends sought

to be reached. The ends sought to be reached by Equity Rule 13 are evidently (1) to provide an easier means of service than serving the defendant personally, and (2) to give the defendant notice. If the marshal must determine at his peril the age of the person served, the rule, instead of being an advantage to the suitor may be a pitfall and a snare. Moreover, a "matured person" is more likely to give notice to the defendant than a "person of full age," for the test of maturity in fact, is substituted for an arbitrary period of years.

The practical operation of the rule should also be considered. The marshal has no means of determining the age of the person served, except the statement of the person. He can see the maturity or lack of maturity of the person at a glance, and can ascertain it with certainty by a few moments conversation.

It will no doubt be argued by appellee that such a construction adopts an uncertain rather than a certain standard. But uncertain for whom? If the defendant in fact has no notice, the uncertainty for him is immaterial. He will know nothing of the suit. If he has notice, and chooses to sit by, let him risk the consequences of his gambling with the process of courts of justice. The marshal can determine in the first instance maturity more easily than age. The court can determine maturity like any other question of fact. But the defendant will say, if the age test is adopted, a man will know whether he has been served or not. The answer is that if the defendant has notice, he should come in and defend. He is in effect saying that the court should let him speculate with safety.

Moreover, the construction of a "matured person" will bring the rule into harmony with existing law. In 21 R. C. L. 1281 it is said:

> "The statutes usually require that the person with whom a copy is left, when service is made at the house or the usual abode, shall be of suitable age and discretion. The following persons have been held to come within this requirement: a child fourteen years of age; a sister of the defendant who was keeping house for him; and the wife of the defendant, although she was unable to read, write or understand English."

Counsel have searched in vain for cases construing the words "adult person" as used in Equity Rule 13, or in similar statutes. There may be such cases, but we have been unable to find them. The usual statute does not use these words. The words "adult person" appear to have been incorporated in the Federal Equity Rules in this connection in 1866. Prior to that time the term "some free white person" was used in the same connection.

Two cases illustrate the fact that the courts will interpret the rule so as to effectuate its object.

Phoenix Ins. Co. v. Wulf (C. C. Dist. of Ind.) 1 Fed. 775, was a suit in equity in which a copy of the subpoena had been left with defendant's husband in a grocery store on the ground floor of the building upon the second floor of which defendant resided. The court declared that this was proper service of process under Rule 13. The court in the course of its opinion said:

> "A copy was left with one who understood its contents, and was likely to deliver it to the person for whom it was intended. * * * Rule 13 *must receive a reasonable construction.* * * * The rule is satisfied by a service outside the dwelling-house, at the door, just as much as inside the house." (Italics ours.)

In re Risteen, 122 Fed. 732 (Dist. Ct. Mass., Judge Lowell), arose upon a plea in abatement wherein it was contended that the service of an involuntary petition in bankruptcy was insufficient. Section 18a of the Bankruptcy Act of 1898 provided that service of the petition with a writ of subpoena should be made in the same manner in which service of such process is now had upon the commencement of a suit in equity in United States courts. In other words, the Bankruptcy Act required process to be served in accordance with Equity Rule 13. The petition in this matter was against the proprietor and manager of a hotel. The copy of the writ was left with the clerk of the hotel at a time when the man against whom the petition was filed was actually in another city. The court held that Rule 13 had been complied with.

Two things are established by these cases: (1) that Rule 13 must be given a reasonable construction; and (2) that one of the purposes of Rule 13 is to insure that the copy of the subpoena be left with one who may understand its contents and is likely to deliver it to the person for whom it is intended. We do not contend that if the rule is not complied with, there is

in fact service. Notice is not service, although notice has a bearing in other connections in this case. (See Point I. B.) We do contend that the two purposes of Rule 13 are to provide an easier mode of service than personal service on the defendant, and to insure that the copy of the subpoena will be left with one who may understand its contents and is likely to deliver it to the person for whom it is intended. We further contend that the rule must be construed in the light of these purposes. The construction of "adult person" as "matured person" better effectuates these purposes than the construction "person of full age."

Blythe v. Hinckley, 84 Fed. 228 (C. C. Cal.), was relied on by defendant in the court below. There the service was made by leaving the subpoena with the wife of the brother of the deceased husband of the defendant, "who is" (to quote the words of the return) "a resident in the place of abode of Florence Blythe Hinckley, said defendant named therein." Judge Morrow said that the face of the return did not comply with Rule 13 because a "resident in the place of abode" of defendant was not a "resident of the family" of defendant. He showed that if John Smith and Sam Jones were strangers living in a large hotel, service on John Smith for Sam Jones would be service on "a resident in the place of abode" of defendant, *"with no probability whatever that it would reach the party for whom it was intended."* It will be seen that Judge Morrow likewise recognized the purpose of the rule. His reasoning is sound, and with it we have no quarrel.

Compare *In re Risteen supra* (which is entirely harmonious with *Blythe v. Hinckly*) where service on the clerk of a hotel was held to be good service on the proprietor.

In *Von Roy v. Blackman*, Fed. Cas. No. 16,997, the return showed that the service was made on a person over the age of fourteen years. The court did not notice this as affecting the service. Speaking of this decision, the author of 1 Street's Federal Equity Practice, at section 595, page 371, says:

> "The fact was not observed upon that the return also failed to show that the copy was left with an adult, though this was doubtless a fatal defect. In our law, a person is not an adult in either legal or common acceptance until he is of full legal age. In the civil law a male is adult at fourteen."

With all due deference to the learned author, we submit that he did not observe that Equity Rule 13 does not use the noun "adult," but the words "adult person." It is the noun "adult" that has the meaning "a person of full age," although it also has other meanings as "one who has reached maturity." The adjective "adult" means "matured" not "of full age." It is to be presumed that the Supreme Court of the United States uses language with precision.

Accordingly we submit that Equity Rule 13 was complied with. We do not ask the court to do violence to the language; we ask the court to give words their meaning, to assume that the Supreme Court used lan-

guage with precision. Such construction effectuates the objects of the rule, is practical, in harmony with existing law, and will make for justice.

IV.

By filing affidavits and a brief in opposition to plaintiff's motion to amend the Marshal's return nunc pro tunc, and by making an argument on the merits, in the brief, defendant Jasper Thomason made a general appearance. Thereby he cured any defects in the jurisdiction of the court over his person and made the decree a good and enforceable decree for all purposes.

A. *By filing affidavits and a brief in opposition to plaintiff's motion to amend the marshal's return nunc pro tunc, and by making an argument on the merits, defendant Jasper Thomason made a general appearance.*

While defendant's motion to quash was pending, plaintiff made an *ex parte* motion to amend the marshal's return, filing an affidavit of Walton, the deputy marshal, and a memorandum of authorities in support thereof. [Tr. 268-279.] In opposition to the application, defendant Thomason filed a brief entitled "Memorandum in Opposition to Application to Amend Marshal's Return." [Tr. 279-297.] The argument contained in the brief is in accordance with this title. The brief begins as follows:

"The application which is now made on behalf of plaintiff for an amendment *nunc pro tunc* of the mar-

shal's return of service upon the defendant Jasper Thomason contemplates the filing of a document which essentially falsifies the amended return upon which the order *pro confesso* was entered and the final decree rendered." [Tr. 279-280.]

The concluding paragraph of the brief begins as follows:

"For all of the foregoing reasons we respectfully submit to the court that the application for leave to amend the return should be denied." [Tr. 296.]

An examination of the entire argument made in the brief of defendant in opposition to the motion to amend will disclose that it admits the power of the court to grant the motion and appeals to the discretion of the court to deny it. The brief made the further argument on the merits that the amendment would prove nugatory since the decree exceeded the prayer of the bill. [Tr. 295-296.]

In addition to the brief defendant Thomason filed six affidavits in opposition to the motion to amend (which are referred to in the brief), which affidavits specifically refer to and deny the affidavit of Walton filed in support of the motion to amend. [Tr. 297-314.]

In the court below defendant heavily emphasized the point that plaintiff's motion to amend the return was occasioned by defendant's motion to quash, and that the two were argued together; at least somewhat. A fair reading of the record leaves no doubt that this is true, but what of it?

Whatever may have been the occasion for the motion to amend the return, the fact remains that the defendant opposed it; that in so doing he expressly appealed to the court's discretion; that he made an argument on the merits; and that he filed affidavits on the facts in opposition to the motion. Suppose defendant attacked a judgment based on an insufficient complaint, and thereupon plaintiff offered to amend the complaint. No one would doubt that defendant's opposition to such a motion would constitute a general appearance. The defendant's motive for opposing the motion is immaterial; it is his opposition that counts. It does not matter why defendant became an actor in the cause; the fact is he became an actor.

Although defendant's brief and affidavits in opposition to the motion to amend were occasioned by the motion to amend, which was occasioned by the motion to quash, they were not filed in support of the motion to quash. As has been pointed out already, they purported to be and were in opposition to the motion to amend. The brief had no relation to the motion to quash. In order for defendant to succeed, it was not necessary to oppose the motion to amend. Although the amendment was allowed, the motion to quash was granted.

Moreover, counsel for defendant appealed to the discretion of the court. Discretion can only be exercised after jurisdiction is conceded. To appeal to the discretion is to admit the jurisdiction. This is fundamental. A challenge to the jurisdiction is a challenge

of the power of the court to act at all. The brief of defendant *asked* the court to deny the amendment, because on the *showing* made by *defendant* in the affidavits in opposition to the motion to amend, the court ought to exercise its *discretion* to deny the motion to amend.

What happened was that the defendant thought the exigencies of the situation demanded action, but even preliminary steps taken in answer to pressing necessity, which ask the court to take or not to take any action other than action going to the jurisdiction are held to be a general appearance.

In *Sterling Tire Corporation v. Sullivan,* 279 Fed. 336 (C. C. A. 9th Cir. on appeal from the Northern District of California) it was held that asking that a receiver's bond be made larger is a general appearance.

In *Twin Lakes Land and Water Co. v. Dohner,* 242 Fed. 399 (C. C. A. 6th Cir.), and in *Great Lakes and St. Lawrence Transportation Co. v. Scranton Coal Co.,* 239 Fed. 603 (C. C. A. 7th Cir.), it was held that opposing a motion for a preliminary injunction constituted a general appearance.

In *Lively v. Picton,* 218 Fed. 401 (C. C. A. 6th Cir.), there was a dictum that a motion to set aside an order appointing a receiver is a general appearance.

These cases involved action purely on preliminary matters where the exigency was great, yet the appearances were held general.

Moreover, the defendant went one step further in this case; he contended that the motion to amend the return should not be granted because the judgment was in excess of the prayer of the complaint. [Tr. 295, 296.] This necessarily involved a consideration of the merits. In this connection the case of *Crawford v. Foster*, 84 Fed. 989 (C. C. A. 7th Cir.), is directly in point. There a motion was made by plaintiff to revive a judgment. Defendant entered a special appearance to object to the jurisdiction over the defendant's person *and because the judgment was void on its face.* The court held that such action constituted a general appearance.

Of course, the general rule that any action going to the merits, or invoking discretion constitutes a general appearance is undoubted.

> *Jones v. Andrews,* 10 Wall. 327; 19 L. Ed. 935;
>
> *Lowry v. Tile, Mantel & Grate Association of California,* 98 Fed. 817 (C. C. N. D. Cal. Judge Morrow);
>
> *Orinoco Co. v. Orinoco Iron Co.,* 296 Fed. 965, 970 (Ct. of App. D. of C.);
>
> *Twin Lakes Land & Water Co. v. Dohner,* 242 Fed. 399, 403, 404 (C. C. A. 6th Cir.);
>
> *Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co.,* 239 Fed. 603 (C. C. A. 7th Cir.);
>
> *Ricketts v. Bolton,* 173 Ky. 739, 743, 191 S. W. 471, 473;
>
> *German Mutual Farmers Fire Insurance Co. v. Decker,* 74 Wis. 556, 43 N. W. 500.

Is making a motion to amend a return, or opposing such a motion (for the two are on the same plane), within the rule?

Only two cases directly in point have been found, and they both hold that there is a general appearance.

> *Bestor v. Inter-County Fair,* 135 Wis. 339, 115 N. W. 809;
>
> *Stubbs v. McGillis,* 44 Colo. 138, 96 Pac. 1005, 18 L. R. A. (N. S.), 405.

In *Bestor v. Inter-County Fair,* the defendant moved to amend the return of the sheriff to speak the facts and to quash the service as insufficient. It was held that the motion to amend was a general appearance and waived the defect in service. The court said at page 809 of 115 N. W.:

> "The mere fact that the defendant stated that he appeared specially to object to the jurisdiction of the court will not protect him from the consequences of a general appearance, if the proceedings taken by him show that he appeared for any purpose consistent with jurisdiction. In the case before us the defendant moved the court to amend the return of the officer to the summons to conform to the facts. This motion was inconsistent with want of jurisdiction of the court over the person of the defendant. The court could not grant the motion without jurisdiction of the person and the subject-matter. The asking of the relief prayed for in the motion, whether granted or not, was a submission by defendant to the jurisdiction of the court and a waiver of all jurisdictional defects."

Resisting a motion is in the same category as making the motion. Thus in 4 C. J. 1334 it is said:

> "A general appearance is also made * * * by contesting or resisting a motion."

To the same effect see:

Twin Lakes Land and Water Co. v. Dohner, 242 Fed. 399 (C. C. A. 6th Cir.);

Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co., 239 Fed. 603 (C. C. A. 7th Cir.);

Ricketts v. Bolton, 173 Ky. 739, 191 S. W. 471, 473;

German Mutual Farmers Fire Insurance Co. v. Decker, 74 Wis. 556, 43 N. W. 500.

And see cases cited under IV B and IV C *infra*.

In *Stubbs v. McGillis*, 44 Colo. 138, 96 Pac. 1005, 18 L. R. A. (N. S.) 405, a judgment by default was entered against the defendant. Thereafter the defendant petitioned (1) to vacate the judgment for lack of service, (2) to quash the return of garnishment. The plaintiff made a counter motion to amend the sheriff's return. There was an oral hearing on the motions. The defendant's motion was granted and the plaintiff's motion was denied. On appeal, the court upheld the judgment of the lower court, but said that the defendant, by opposing the motion to amend the return, made a general appearance. It therefore remanded the cause, with directions to the defendant to answer.

The point that the defendant, by opposing the motion to amend the return, made the judgment enforceable, which we will make *infra,* was not raised, and was, therefore, not before the court. An examination of the case will show that counsel made no contention on that point, evidently overlooking the large body of authority, which we shall cite *infra.* The case is, however, a direct authority to the effect that opposition to a motion to amend a sheriff's return is a general appearance.

We see then that the only two cases directly in point uphold appellant's contention. The gist of defendant's argument in the court below was that in the Federal courts the question of appearance is one of intent, and that the motion to amend was so closely connected with the motion to quash, that defendant's opposition to it did not manifest an intent to appear. We have seen, however, that defendant's brief and his argument therein were addressed solely to the discretion of the court on the question of allowing the motion to amend. We have seen that in addition he argued the merits. We have seen that he filed affidavits which he expressly stated to be in opposition to the motion to amend. That plaintiff's motion was suggested by defendant's motion can make no difference. *Stubbs v. McGillis, supra,* and *Bestor v. Inter-County Fair, supra,* are a complete answer to this argument.

In the Federal courts, as in other courts, the question of general appearance is one of intent, if the word "intent" is properly understood. By intent is not meant

what defendant means or what he says, but objective intent judged by what the defendant does.

This must be so. Otherwise, defendant could go all through a trial on the merits protesting that he appeared specially, and it would not be a general appearance. Of course this is not the law.

In the last analysis the test of intent comes to exactly the same as the other test of general appearance laid down by the cases, namely, whether defendant has asked any action on the part of the court other than to dismiss for want of jurisdiction.

The cases make clear that it is the action of the defendant that counts.

In *Wabash Western Railway v. Brow,* 164 U. S. 271, the court said, at page 278:

> "An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant *even when not in fact intended.*" (Italics ours.)

In *Edgell v. Felder,* 84 Fed. 69 (C. C. A. 5th Cir.), the court said, at page 70:

> "The appellants * * * must be held to have entered a general appearance to the bill, and thereby waived any privilege they might have had to object to being sued in the district in which the complainant resides, *although by the terms of the writing actually filed with the clerk, the appearance made was a limited appearance.*"

To the same effect is

Clark-Herrin-Campbell Co. v. H. B. Claflin Co., 218 Fed. 429 (C. C. A. 5th Cir.)

In *Crawford v. Foster,* 84 Fed. 989 (C. C. A. 7th Cir.), the court said. at page 941:

> "It is to be observed in passing that a party cannot be both in court and out of court * * * "although called special, the first appearance of the defendant probably ought to be regarded as general. No words of reservation can make an appearance special which is in fact to the merits."

There is nothing in defendant's cases cited in the court below to the contrary. The question of intent in each case is tested by the acts done. It seems clear that this must be the law for otherwise we would have an absurdity.

In *S. P. Co. v. Arlington Heights Fruit Co.,* 191 Fed. 101 (C. C. A. 9th Cir.), in *Kelly v. T. L. Smith Co.,* 196 Fed. 466 (C. C. A. 7th Cir.), and in *Davidson Bros. Etc. v. U. S.,* 213 U. S. 10, 53 L. Ed. 675, the defendant appeared specially and objected to the jurisdiction of the court both over the person and of the subject matter. The court in each instance held the appearance to be special since the challenge was only to the jurisdiction. An examination of the cases will disclose that the holding was based on the fact that there was no other action taken than a challenge to the jurisdiction of the court.

In *S. P. Co. v. Arlington Heights Fruit Co.* the court said at page 110:

> "In the case at bar all three of the grounds assigned by the plea went to the jurisdiction of the court in one sense—the first to the jurisdiction over the person, and the last two to the jurisdiction of the court as a court of equity."

And in the same case the court cited with approval at page 106 the case of *St. Louis etc. Railway Co. v. McBride,* 141 U. S. 127, where the attack was not alone on the question of jurisdiction of the court and the appearance was held to be general.

In *Kelly v. T. L. Smith Co.* the court said at page 469:

> "Clearly the intent was to urge only objections to jurisdiction."

In *Davidson Bros. etc. v. U. S.* the point chiefly discussed was as to the validity of a rule of the Circuit Court holding that defendant must agree to appear generally or the special appearance of defendant would be converted into a general appearance. The court held that the rule was invalid. The case involved a holding, however, though the point was not directly discussed, that a challenge to the jurisdiction over the person and of the subject matter is a special appearance. At page 19 the court said:

> "The defendants appeared specially, as they had a right to do, solely for the purpose of objecting to the jurisdiction."

It will be seen, therefore, that these cases rest on the proposition that the appearance was solely to object to the jurisdiction of the court. That being so, they are in no wise contrary to the proposition contended for by the plaintiff. Here the action of the court invoked was discretionary and, as has been pointed out, the court could only exercise discretion after it had jurisdiction. Moreover, in the case at bar, defendant made an argument on the merits. We submit, therefore, that these cases are not authorities against the plaintiff. They were not intended to conflict with cases of the type of *Jones v. Andrews,* 10 Wall. 327, 19 L. Ed. 935, where it was held that a motion to dismiss on the ground of (1) no jurisdiction over the person, and (2) a want of equity in the bill is a general appearance. So here the action of the court sought to be invoked by the defendant did not relate solely to the jurisdiction of the court, and accordingly the appearance was general.

In *Wood v. Wilbert's Sons etc.,* 226 U. S. 384, 57 L. Ed. 265, no point as to appearance was passed on by the court, because the ruling on the question was not assigned as error. The court said as to the question of appearance at page 386: "The ruling is not assigned as error." Nothing, therefore, is decided by this case on the point of appearance.

In *Grable v. Killits,* 282 Fed. 195 (C. C. A., 6th Cir.), there was a special appearance and a motion to set aside the service of process and several orders

based on that service, among them orders for a tempororary injunction, receivership, etc. It was held that the defect only applied to part of the orders and that they should be set aside. The fact that the motion attempted to set aside for want of jurisdiction other orders did not convert the appearance into a general appearance, nor did a motion of the defendants to amend their motion to set aside the service by inserting the name of another defendant make it a general appearance.

There is nothing in this case in conflict with the position of the plaintiff. Clearly the fact that several orders were attacked for want of jurisdiction and only some of them were set aside did not make the appearance general. The only attack was on the jurisdiction of the court. That that attack was unsuccessful in part did not change it into an attack on anything else but the jurisdiction. Moreover, it is quite clear that the amendment of the defendants of their motion attacking the jurisdiction of the court was not a general appearance. It would be just as if the defendant here had amended their motion to quash by inserting some words. If the motion was not a general appearance, of course the amendment to the motion likewise would not be a general appearance. We submit that the case is not in point.

In *Dahlgren v. Pierce,* 263 Fed. 841, defendants' counsel, while arguing a motion to vacate the service for want of jurisdiction, made some arguments as to the merits of the bill. The court held there was no

general appearance. The court said that the argument was unimportant because no action of the court was sought to be invoked thereby. There was nothing before the court on which the court could take action, except the motion to vacate for want of jurisdiction. The court said at page 846:

> "We come, then, to the result of the conduct of petitioner's counsel in arguing, also, that the motion to vacate ought to be granted, because the bill was not good and should be dismissed. If a motion to dismiss had been made upon these grounds before the motion to vacate had been passed upon, it might well have been a waiver; but it will be noticed that petitioner had then never asked any relief, except that the motion to vacate should be granted. The written brief and argument, which the district judge found to be equivalent to a general appearance, concluded: 'We respectfully submit that the order should be set aside.' There was then no other issue, either of law or of fact."

The case is distinguishable from the case at bar in that there the argument made asked no action of the court. The only thing before the court was the motion to vacate the service. Here there was before the court another motion, namely, the motion to amend the return to which the argument on the merits was directed. The court clearly indicated that in such a situation, the appearance would be general. The point on which the whole case turned was the fact that nothing was sought by the argument.

Here something was sought by the argument. The court cited with approval *Jones v. Andrews,* 10 Wall. 327, 19 L. Ed. 935, *supra.*

We should again like to call the court's attention to the argument on the merits made by the defendant in this case *in support of the defendant's opposition to the motion to amend.* We submit that the foregoing case impliedly is an authority that such an argument directed to a pending motion is a general appearance, and in this connection we again call attention to *Crawford v. Foster,* 84 Fed. 989 (C. C. A., 7th Cir.).

In *Salmon Falls Mfg. Co. v. Midland Tire & R. Co.,* 285 Fed. 215 (C. C. A., 6th Cir.), there was an attachment suit against a non-resident defendant. The defendant appeared and objected on jurisdictional grounds and at the same time pleaded its defense to the merits but only in so far as the attached property was concerned. The appearance was held special, except as to the attached property. This is clearly right. The cases all hold that in an attachment suit against a non-resident defendant, he can defend his property over which the court has jurisdiction to the limit without submitting his person to the court. To hold otherwise would deprive the defendant of his property without giving him a chance to defend. If the case proves anything else than this, it proves too much, for it proves that a defendant could answer at the same time

that he objects to the jurisdiction without making a general appearance. This, of course, is not the law.

Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935;
Lowry v. Tile, Mantel & Grate Association of California, 98 Fed. 817 (C. C., N. D., Cal., Judge Morrow);
Orinoco Co. v. Orinoco Iron Co., 296 Fed. 965, 970 (Ct. of App., D. of C.).

In *Genl. Inv. Co. v. Lake Shore etc. Co.,* 260 U. S. 261, 67 L. Ed. 244, it was held:

(a) That a removal petition is not a general appearance. This is clear law supported by all the cases, the reason being that to hold otherwise would deprive the defendants of a substantial right given by statute, namely, the right to remove to the federal court, and for the further reason that as to the defendant, the proceeding in the federal court is a proceeding *de novo.*

(b) That a stipulation that testimony taken in the state court on the question of jurisdiction over the person of the defendants could be used in the federal court on the same question was not a general appearance. This also seems quite clear. The stipulation brought before the court the testimony directed to the question of jurisdiction over the person of the defendant. It is just as though the court had ordered an oral hearing in this case on the motion to quash the return and the defendant had offered testimony. Of course, that would not be a general appearance.

(c) That signing a brief "Solicitors for Defendants" was not a general appearance when the brief showed in many places that it was filed only on behalf of one defendant and stated that the other parties were not now defendants, their objections to the jurisdiction having been sustained. This seems clearly right. The addition of the "s," in view of all the rest of the brief, was clearly not an appearance for the other defendants when the brief stated that they were not in the case.

We submit that there is nothing in the case that makes it contrary to the contention of plaintiff in the case at bar.

Pine Hill Coal Co. v. Gusicki, 261 Fed. 974, and *Yanuszankas v. Mallory S. S. Co.*, 232 Fed. 132, are two cases in the Circuit Court of Appeals for the Second Circuit holding that obtaining an order extending time is not a general appearance. This is a question on which there is much difference of opinion. See to the contrary:

> *Everett Ry. Light & Power Co. v. U. S.*, 236 Fed. 806 (D. C., Wash.);
> *Murphy v. Herring-Hall-Marvin Safe Co.*, 184 Fed. 495 (C. C., Nev., Judge Van Fleet);
> *Briggs v. Stroud*, 58 Fed. 717 (C. C., E. D., Wis.);
> *Brookings State Bank v. Federal Reserve Bank*, 291 Fed. 659 (D. C., Ore., citing several federal authorities);
> *Placek v. American Life Ins. Co.*, 288 Fed. 987 (D. C., Wash.).

Without attempting to decide which set of authorities is correct, it is plain that the situation is not analogous to the case at bar. An extension of time is simply holding the situation in *statu quo.* It involves no action in the case one way or the other. It would seem, therefore, that the cases are not in point here.

On the same question of obtaining time to plead, defendant in the court below cited *Davenport v. Superior Court,* 183 Cal. 506. Appearance in California is governed by section 1014 of the Code of Civil Procedure which provides that: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of appearance for him." The court held that obtaining an order extending time was not a general appearance. But the court expressly recognized the authority of cases holding that entering into a stipulation giving additional time to plead was a general appearance.

Zobel v. Zobel, 151 Cal. 98, holds that asking a continuance of hearing on a motion amounts to a general appearance. It has never been overruled. This delightfully logical state of the California law, originating from the peculiar section 1014, can render this Court but little help in solving the problem here presented. Appellee argued also in the court below that another point involving an appeal to discretion was decided by the *Davenport* case. We cannot find it in the case.

In *Garvey v. Compania Metalurgica Mexicana,* 222 Fed. 732 (W. D., Tex.), it was held that a deposition

taken in support of a motion to quash for want of jurisdiction is not a general appearance. This seems quite clear also. It is just as though the defendant had produced testimony on the hearing of his motion to quash. Of course, this would not be a general appearance. It is simply proving that the facts set forth in the motion are true, and the testimony is directed only to the jurisdiction of the court. This case likewise is not in point.

We submit that the action of the defendant in opposing the motion to amend was a general appearance because it invoked the action of the court on a question that was not one of jurisdiction; because it appealed to the discretion of the court and discretion is fundamentally opposed to lack of jurisdiction; and because it argued the merits of the case on a pending motion before the court not directed to the jurisdiction.

B. *Where, as in this case, defendant makes a special appearance to object to the jurisdiction, as for instance a motion to quash service, and pending decision on the motion, he does something which amounts to a general appearance, his objections to the jurisdiction are waived, and his motion will be denied.*

This point was not contested by the defendant in the lower court, and will not be argued at length. The authorities uniformly uphold the proposition stated.

> *Yale v. Edgerton,* 11 Minn. 271, Gil. 184;
> *New Albany & S. R. Co. v. Combs,* 13 Ind. 490;

Barnes v. Western U. Tel. Co., 120 Fed. 550;

Grizzard v. Brown, 2 Tex. Civ. App. 584, 22 S. W. 252;

Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670;

German Ins. Co. v. Frederick, 7 C. C. A. 122, 19 U. S. App. 24, 58 Fed. 144 (C. C. A., 8th Cir.).

In passing it may be well to note one distinction. Where the defendant makes a special appearance to object to the jurisdiction of the court over his person, and the objection is overruled, and he then makes a general appearance, the authorities are divided as to whether he waives the lack of jurisdiction over his person. (4 C. J. 1365-1367.) Where, as in this case, he makes a special appearance to object to the jurisdiction, and before decision on the subject, does something amounting to a general appearance, all the authorities agree that there is a waiver.

C. *The fact that the general appearance is made after decree instead of before is immaterial. It cures any defects in the jurisdiction of the court over the person of the defendant and the decree is a good and enforceable decree for all purposes.*

This point was not contested by the defendant in the court below. The authorities uniformly sustain it. In order to avoid lengthening a brief already too long we shall cite the authorities without argument.

Ann. Cas., 1914 C, 694, note;

4 *C. J.,* 1364, 1365;

Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670;

Sugg v. Thornton, 132 U. S. 524, 530;

Security Loan and Trust Co. v. Boston etc. Co., 126 Cal. 418;

Willett v. Blake, 134 Pac. 1109 (Sup. Ct., Okla.);

Johnson Loan and Trust Co. v. Burr, 51 Pac. 916 (Ct. App. of Kan.);

Boulder Colorado Sanitarium v. Vanston, 94 Pac. 945 (Sup. Ct. of N. M.);

Crowell v. Kopp, 189 Pac. 652 (N. M. Sup.);

Jackson v. Lebanon Reservoir and Ditch Co., 171 Pac. 997 (Ariz. Sup.);

German Mutual Farmers Fire Insurance Co. v. Decker, 74 Wis. 556, 43 N. W. 500;

Barba v. People, 18 Colo. App. 16;

Ryan v. Driscoll, 83 Ill. 415;

McCarthy v. McCarthy, 66 Ind. 128;

Balfe v. Rumsey etc. Co., 55 Colo. 97, 133 Pac. 417;

Pry v. Hannibal and St. Joseph R. R. Co., 73 Mo. 123;

Tisdale v. Rider, 104 N. Y. S. 77;

Borough of Jeannette v. Roehme, 47 Atl. 283 (Sup. Ct. of Pa.);

Nelson v. Nebraska Loan and Trust Co., 87 N. W. 320, (Sup. Ct. of Neb.);

Nebraska Loan and Trust Co. v. Kroener, 88 N. W. 499 (Sup. Ct. of Neb.).

Barnett v. Holyoke Mutual Fire Ins. Co., 97 Pac. 962 (Sup. Ct. of Kan.);

Clarkson v. Washington, 131 Pac. 935 (Sup. Ct. of Okla.)

Accordingly, we submit:

1. That the opposition of the defendant Thomason to the motion to amend constituted a general appearance.

2. That such general appearance cured any defects in the service, and made the decree good and valid for all purposes.

Conclusion.

In the court below defendant protested much about the great injustice that was being done him by denying him his day in court. It is quite clear, however, that Thomason is not seeking his day in court, for he does not ask leave to defend. He makes no showing, or even statement, that he has a meritorious defense. He had full notice of this suit and defended in effect through the other members of his family, who were defendants as well. He chose to stand by and gamble with the result. Now he seeks to have this court of equity place the shield of the statute of limitations between him and the justice which has been delayed too long, to make him secure in the fruits of his fraud. We submit that neither on strict rules of law nor on broad principles of equity is the defendant entitled to succeed in this attempt.

Respectfully submitted,

William Story, Jr.,
Joseph L. Lewinson,
Laurence W. Beilenson,
Solicitors for Appellant.

No. 4694.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frances Investment Company, a corporation,

Appellant,

vs.

Jasper Thomason,

Appellee.

BRIEF FOR APPELLEE.

WM. T. KENDRICK,
GURNEY E. NEWLIN,
A. W. ASHBURN,
Solicitors for Defendant Jasper Thomason, Appearing Specially Herein for the Purpose of Contesting Jurisdiction Over Person and Not Appearing Generally Herein.

FILED
FEB 1 - 1926

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

PAGE.

Statement of Facts 3

Brief of Argument 17

Point I. The Return of Service of Subpoena Is Not Conclusive 17

Point II. The Court Has No Power to Impose Conditions Upon the Granting of a Motion to Vacate, Where There Has Been No Actual Service 20

Point III. The Evidence Is Sufficient to Rebut the Marshal's Return and Affidavit.. 21

Point IV. Rosamond Thomason Was Not an Adult Person Within the Purview of Equity Rule 13 22

Point V. Defendant's Opposition to the Motion to Amend Return of Service Did Not Work a General Appearance 23

Argument 25

Point I. The Return of Service of Subpoena Is Not Conclusive 25

Point II. The Court Has No Power to Impose Conditions Upon the Granting of a Motion to Vacate, Where There Has Been No Actual Service 51

Point III. The Evidence Is Sufficient to Rebut the Marshal's Return and Affidavit.. 69

Point IV. Rosamond Thomason Was Not an Adult Person Within the Purview of Equity Rule 13 80

Point V. Defendant's Opposition to the Motion to Amend Return of Service Did Not Work a General Appearance 85

TABLE OF CASES AND AUTHORITIES CITED.

PAGE.

American Cereal Co. v. Eli Pettijohn Cereal Co., 70 Fed. 276 22
American Cereal Co. v. Ely Pettijohn Cereal Co., 70 Fed. 398 75
Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 206 21
Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 206 65
Bacon Bros. v. Grable, 260 U. S. 735.......... 99
Bacon v. Federal Reserve Bank, 289 Fed. 513, 515.. 21
Bacon v. Federal Reserve Bank, 289 Fed. 513, 515.. 68
Banco de Sonora v. Bankers' Mut. Cas. Co., 100 N. W. 532 (Iowa).......... 23
Banco de Sonora v. Bankers' Mut. Cas. Co., 100 N. W. 532, 535 80
Bayley, Petitioner, 132 Mass. 457.......... 18
Bayley, Petitioner, 132 Mass. 457.......... 28
Benton v. McIntosh, 96 Fed. 132.......... 22
Benton v. McIntosh, 96 Fed. 132.......... 75
Bestor v. Inter-County Fair, 135 Wis., 339 (distinguished) 24
Bester v. Inter-County Fair, 135 Wis. 339.......... 91
Blythe v. Hinckley, 84 Fed. 228 (C. C., N. D. Cal.) 17
Blythe v. Hinckley, 84 Fed. 228, 111 Fed. 827.......... 19, 23, 26, 33, 38, 84
Boyd v. Dean, 8 Sask. L. 1.......... 18
Boyd v. Dean, 8 Sask. L. 1.......... 28
Bradley v. Burrhus, 135 Ia. 324.......... 49
Bradley Mfg. Co. v. Burrhus, 135 Ia. 324.......... 19
Bradley Mfg. Co. v. Burrhus, 135 Ia. 324.......... 20
Bradley Mfg. Co. v. Burrhus, 135 Ia. 324.......... 60
Briggs v. Stroud, 58 Fed. 717 25
Briggs v. Stroud, 58 Fed. 717..........107

PAGE.

Brookings State Bank v. Federal Reserve Bank, 291 Fed. 659 25
Brookings State Bank v. Federal Reserve Bank, 291 Fed. 659 107
Cal. C. C., Secs. 25, 26 and 27 82
Caldwell v. Glenn, 6 Rob. (La.) 9 20
Caldwell v. Glenn, 6 Rob. (La.) 9 58
Cal. C. C., Sec. 25 23
Cal. C. C., Sec. 27 23
4 C. J. at 1333 24
4 C. J. 1333 95
Colter v. Luke, 108 S. W. (Mo. App.) 22
Colter v. Luke, 108 S. W. 608 78
25 Cor. Juris. 664 79
1 Cor. Juris. page 1403 81
Cowden v. Wild Goose etc. Co., 199 Fed. 561, 565 (distinguished) 20
Cowden v. Wild Goose etc. Co., 199 Fed. 561, 565 63
32 Cyc. at 462 20
32 Cyc. page 462 52
Dahlgren v. Pierce, 263 Fed. 841 (C. C. A., 6 Cir.) 24
Dahlgren v. Pierce, 263 Fed. 841 97
Davenport v. Superior Court, 183 Cal. 506 25
Davenport v. Superior Court, 183 Cal. 506 106
Davidson Bros. Marble Co. v. U. S. *ex rel* Gibson 213 U. S. 10, 53 L. Ed. 675 21
Davidson Bros. Marble Co. v. U. S. *ex rel* Gibson, 213 U. S. 10 66
Everett Ry. etc. Co. v. U. S., 236 Fed. 806 25
Everett Ry. etc. Co. v. U. S., 236 Fed. 806 106
Fitzgerald etc. Co. v. Fitzgerald, 137 U. S. 98 95
Frank Parmalee Co. v. Aetna Life Insurance Co. 166 Fed. 741 44
1 Freeman on Judgments, Sec. 228, p. 448 (5th Ed.) 19

PAGE.

1 Freeman on Judgments, Sec. 228, page 448 (5th Ed.) 35
3 Freeman on Judgments, Sec. 1229, p. 2558........ 19
3 Freeman on Judgments, Sec. 1201, p. 2494........ 19
3 Freeman, Sec. 1201, page 2494.................... 36
3 Freeman on Judgments, Sec. 1229, page 2558.... 49
1 Foster's Fed. Prac., Sec. 167a.................... 19
1 Foster's Fed. Prac., Sec. 181, pp. 1050, 1051.... 21
1 Foster's Federal Practice, Section 167a,.................. 37
1 Foster's Federal Practice, Sec. 181, pp. 1050, 1051 65
Fountain v. Detroit etc. Co., 210 Fed. 982................ 18
Fountain v. Detroit etc. Co., 210 Fed. 982................ 18
Fountain v. Detroit etc. Co., 210 Fed. 982............ 28
Fulton v. Association, 172 Pa. 117.................... 48
Garvey v. Compania etc., 222 Fed. 732 (Dist. Ct. Tex.) 24
Garvey v. Compania etc., 222 Fed. 732....................100
General Investment Co. v. Lake Shore etc. Ry. Co., 260 U. S. 261, 67 L. Ed. 244 at 252...................... 24
General Investment Company v. Lake Shore etc. Ry. Co., 260 U. S. 261 101
Grable v. Killits, 282 Fed. 185 24
Grable v. Killits, 282 Fed. 185.................... 98
Hagerman v. Empire Slate Co., 97 Pa. 534............ 49
Harkness v. Hyde, 98 U. S. 476.................... 96
Harrell v. Mexican Cattle Co., 73 Tex. at 615........ 20
Harrell v. Mexican Cattle Co., 73 Texas, at 615.... 59
Harris v. Hardeman, 14 How. 336, 14 L. Ed. 444.. 17
Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444 ....19, 23, 26, 33, 84
Heinemann v. Pier, 85 N. W. 646 (Wis.)................ 22
Heineman v. Pier, 85 N. W. 646.................... 77
Higham v. Iowa etc. Assn. (C. C. Mo.), 183 Fed. 845 19

PAGE.

Higham v. Iowa etc. Assn., 183 Fed. 847 22
Higham v. Iowa etc. Assn. (C. C. Mo.) 183 Fed. 845 43
Higham v. Iowa etc. Association, 183 Fed. at 847 75
Jackson v. Smith, 200 Pac. 542 (Okla.) 22
Jackson v. Smith, 200 Pac. 542 79
Joseph v. New Albany etc. Co., 53 Fed. 180 (distinguished) 19
Joseph v. New Albany etc. Co., 53 Fed. 180 46
Kelley v. T. L. Smith Co., 196 Fed. 466 (7 C. C. A.) 24
Kelley v. T. L. Smith Co., 196 Fed. 466 94
King v. Davis, 137 Fed. 198, 210, 157 Fed. 676 .... 17, 18, 23, 26, 28, 84
Kirby v. Lake Shore etc. R. R. Co., 120 U. S. 130, 30 L. Ed. 569, 572 21
Kirby v. Lake Shore etc. R. R. Co., 120 U. S. 130; 30 L. Ed. 569, 572 65
Kochman v. O'Neill, 202 Ill. 110 20
Kochman v. O'Neill, 202 Ill. 110 62
Mahr v. Union Pacific R. Co., 140 Fed. 921 95
Martin v. Gray, 142 U. S. 236 (distinguished) 20
Martin v. Gray, 142 U. S. 236 63
Mass. etc. Assn. v. Lohmiller, 74 Fed. 23 (C. C. A., 7th Cir.) (distinguished) 20
Mass. etc. Assn. v. Lohmiller, 74 Fed. 23 63
Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. Ed. 272, 277 18
Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. Ed. 272, 277 18
Mechanical Appliance Company v. Castleman, 215 U. S. 437, 54 L. Ed. 272 19
Mechanical Appliance Company v. Castleman, 215 U. S. 437, 54 L. Ed. 272 22

PAGE.

Mechanical Appliance Co. v. Castleman, 215 U. S. 437 28
Mechanical Appliance Company v. Castleman, 215 U. S. 437 36
Mechanical Appliance Company v. Castleman, 215 U. S. 437; 54 L. Ed. 272.......... 75
Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699, 705.......... 18
Mexican Central R. Co. v. Pinkney, 149 U. S. 194 ....31, 84
Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495 25
Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495 107
National Metal Co. v. Greene Con. etc. Co., 11 Ariz. 110 20
National Metal Co. v. Greene Con. etc. Co. 11 Ariz. at page 110 53
Nickerson v. Warren etc. Co., 223 Fed. 843.......... 19
Nickerson v. Warren City etc. Co., 223 Fed. at 845.. 27
Nickerson v. Warren etc. Co., 223 Fed. 843.......... 48
Note 2 to Sec. 167a of Foster's Federal Practice (page 970) 47
O'Connell v. Gallagher, 104 N. Y. App. Div. 492.... 20
O'Connell v. Gallagher, 104 N. Y. App. Div. 492.... 61
Osborne & Co. v. Columbia etc. Corp., 38 Pac. 160, 161 (Wash.).......... 20
Osborne & Co. v. Columbia etc. Corporation, 38 Pac 160, 161 (Wash.) 58
Parmalee Co. v. Aetna Life Ins. Co., 166 Fed. 741 (C. C. A., 7th Cir.) 19
Park Bros. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334 48
Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, 572.. 18
Pennoyer v. Neff, 95 U. S. 714.......... 30

PAGE

Peper Automobile Co. v. American Motor Car etc. Co., 180 Fed. 245 (C. C. E. Dist. Mo.)................ 19
Peper Automobile Co. v. American Motor Sales Co., 180 Fed. 245.. 22
Peper Automobile Co. v. American Motor Car etc. Co., 180 Fed. 245 42
Peper Automobile Co. v. American Motor Sales Co., 18 Fed. 245 75
Phoenix Ins. Co. v. Wulf, 1 Fed. 775, 779................ 18
Phoenix Insurance Co. v. Wulf, 1 Fed. 775, 779.... 28
Pine Hill Coal Co. v. Gusicki, 261 Fed. 974, 977...... 25
Pine Hill Coal Co. v. Cusicki, 261 Fed. 974, 977....105
Placek v. American Life Ins. Co., 288 Fed. 987.... 25
Placek v. American Life Insurance Co., 288 Fed. 987 108
Poor v. Hudson Ins. Co., 2 Fed. 434, 438, 25 C. J. at 664 22
Poor v. Hudson Co., 2 Fed. 432, 438........................ 79
2 R. C. L. at 322 24
2 R. C. L., page 322 96
R. S. Sec. 783; U. S. Comp. Stat. Sec. 1307........ 50
Salmon Falls Mfg. Co. v. Midland etc. Co., 285 Fed. 214 25
Salmon Falls Mfg. Co. v. Midland etc. Co., 285 Fed. 214 102
Savings Bank v. Authier, 52 Minn. 98.................... 20
Savings Bank v. Authier, 52 Minn. 98.................... 60
Schenault v. State, 10 Tex. App. 410, 411, 1 C. J. at 1403 23
Schenault v. State, 10 Tex. App. 410, 411 81
Schlafly v. U. S., 4 F. (2d), 195, 198.................... 21
Schlafly v. U. S., 4 F. (2d) 195, 198........................ 72
Settlemier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110, 1111 17
Settlemier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110, 1111 ....26, 84

PAGE

Simon v. Southern Ry. Co., 236 U. S. 115, 59 L. Ed. 492, 497 19
Simon v. Southern Ry. Co., 236 U. S. 115 31
Smoot v. Judd, 184 Mo. 508 49
Southern Pac. Co. v. Arlington Heights Fruit Co., 191 Fed. 101 (C. C. A., 9th Cir.) 24
Southern Pacific Company v. Arlington Heights Fruit Company, 191 Fed. 101 92
Sterling Tire Corp. v. Sullivan, 279 Fed. 336 24
Sterling Tire Corporation v. Sullivan, 279 Fed. 336 96
1 Street's Fed. Eq. Prac., Sec. 595, at 371 22
1 Street's Fed. Eq. Prac., Sec. 595, page 371 80
Stubbs v. McGillis, 44 Colo. 138 (distinguished) 24
Stubbs v. McGillis, 44 Colo. 138 91
Trimble v. Erie Elec. Motor Co., 89 Fed. 51 (distinguished 19
Trimble v. Erie Electric Motor Co., 89 Fed. 51 47
U. S. v. American Lumber Co., 85 Fed. 827 (9 C. C. A.) 21
U. S. v. American Lumber Co., 85 Fed. 827 65
U. S. v. Marshall, 210 Fed. 595 (8 C. C. A.) 21
U. S. v. Marshall, 210 Fed. 595 71
U. S. v. Miller, 164 Fed. 444 (Dist. Ct. Ore.) 21
U. S. v. Miller, 164 Fed. 444 65
Von Roy v. Blackman, Fed. Cas. No. 16,997, 3 Woods 98,100 (distinguished) 19
Wall v. C. & O. Ry. Co., 95 Fed. 398 22
Wall v. C. & O. Ry. Co., 95 Fed. 398 75
Wilcke v. Duross, 144 Mich. 243 (syllabus) 20
Wilcke v. Duross, 144 Mich. 243 61
Wilmer v. Pica, 118 Md. at 550 20
Wilmer v. Pica, 118 Md. at 550 58
Wolcott v. Ely, 2 Allen 338 18
Wolcott v. Ely, 2 Allen 338 28
Von Roy v. Blackman, Fed. Cas. No. 16,997; 3 Woods 98, 100 47
Yanuszauckas v. Mallory S. S. Co., 232 Fed. 132, 133 25
Yanuszauckas v. Mallory S. S .Co., 232 Fed. 132, 133 105

No. 4694.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frances Investment Company, a corporation,
Appellant,

vs.

Jasper Thomason,
Appellee.

BRIEF FOR APPELLEE.

Statement of Facts.

This action was brought primarily for the foreclosure of certain mortgages and, as an incident thereto, the vacation of a certain Torrens Title proceeding had in the county of Imperial, California, which resulted in a decree adversely affecting the said mortgages so sought to be foreclosed. Appellee, Jasper Thomason, was not a party to the original bill. As amended by the "Amended Supplemental Bill in

Equity," the proceeding retained its original purpose and sought to subject to the title of the mortgagee and the foreclosure sale the title of certain subsequent grantees, who were alleged to have taken with full knowledge of the plaintiff's rights. Said amended pleading likewise sought an accounting from various parties of any money or property which they had received out of the alleged wrongs. The words "fraud" and "conspiracy" are frequently used, but the foregoing is the essence of the proceeding.

Judge James, of the District Court, made an order quashing service of the subpoena and vacating judgment as to the defendant-appellee, Jasper Thomason. It is conceded that no personal service of subpoena was made upon him and that no order was ever made pursuant to Equity Rule 15 designating any person other than the marshal to make service of same. It was shown conclusively that at the time of the attempted service, Rosamond Mildred Thomason (now Rosamond Mildred Hunt), defendant's only unmarried daughter, was but seventeen years and five months of age. [Tr. p. 156.] Appellant must stand upon its proof of substituted service, which necessitates strict adherence to the method prescribed by Equity Rule 13. Thomason at no time appeared in the action, until he made his motion to vacate the judgment. He was not even a witness at the trial. The subpoena issued upon the original bill did not name him. The subpoena on the supplemental bill was directed to him, but no apparent attempt at service on him was made. [Tr. pp. 116-118.]

The subpoena upon the amended supplemental bill was issued May 9, 1921 [Tr. p. 215]; it was delivered to the marshal that same day [Tr. p. 216], and the purported service was made by Deputy W. S. Walton on May 13, 1921. [Tr. pp. 216-218.] In all, four returns of service were made by Walton. Under date of May 13, 1921, his return, filed June 10, 1921, shows substituted service by leaving of copy "with Miss Thomason." [Tr. p. 218.] The return, as filed in the clerk's office, says: "I hereby certify that I received the within writ on the 9th day of May, 1921, on Jasper Thomason ~~and Meryle T. Davis~~ by delivering to and leaving with Miss Thomason for Jasper Thomason, said defendants named therein, personally, at the county of Los Angeles in said district, a copy thereof." By error, the copy of the return printed at page 218 of the transcript fails to show the original insertion and the later elimination of the words "and Meryle T. Davis" (but see stipulation for diminution of record filed herein). It seems apparent that the marshal did not at that time conclude that he had served Mr. Thomason's married daughter, Meryle T. Davis. The decree states that she was never served as a defendant. [Tr. p. 228.]

On October 4, 1923 [See Mr. Lewinson's affidavit, Tr. p. 249], Mrs. Davis was examined in open court, and her own affidavit [Tr. p. 264] shows that the object of the examination was to lay basis for an amended return of service. Mr. Lewinson, in the morning session of court, stated that the marshal's term had expired and that the deputy who had made

the service was then in Seattle and not available for the purpose of making such amendment [Tr. p. 264],—this, notwithstanding the fact that Walton's affidavit shows that only "several days prior to October 4, 1923," he had in the court room discussed with Mr. Lewinson the very amendment which he later filed on October 4. [Tr. p. 277.] During the noon hour, an amended return was made and filed by the said deputy. [Tr. p. 217, Rider, and Tr. p. 265.] That return also shows service on "Miss Thomason." The testimony of Mrs. Davis, given at the morning session, did not warrant the conclusion that the youngest sister, Rosamond, was eighteen years of age at the time of service [Tr. pp. 262, 263, 265], and any doubt on the subject was clarified by the explanation given at the afternoon session. [Tr. p. 266.] She at that time stated that the attempted service had been made upon her youngest sister, *i. e.,* Rosamond.

In the light of this information, the deputy marshal on October 5, presumably at the instance of counsel for plaintiff, made a second amended return in the shape of an affidavit, which was verified October 5 and filed October 12. [Tr. p. 217.] He still adhered to the statement that he had left the copy with "Miss Thomason."

A decree *pro confesso* was entered as to the defendant Thomason on October 12, 1923. [Tr. p. 221.]

A "final decree" was entered against Thomason, and others, on March 24, 1925. [Tr. pp. 222-242.] The bill alleged that Thomason had no financial in-

terest in the transactions involved in the case. [Tr. p. 143.] The prayer of the said amended supplemental bill asked merely for a foreclosure and that defendants account for any money or property received by them and that complainant have general relief. [Tr. p. 146.] The decree adjudged Thomason liable for any deficiency which might occur upon the foreclosure sale [Tr. p. 227], but provides that the said judgment "shall be for not to exceed the highest and best value of the property comprising plaintiff's security at any time between October 2, 1917, and the date of this decree, together with the value of any of the fruits, avails, rents, issues and profits of said security, or any part thereof, that has come into the hands of said defendant." Thomason was not a maker of any of the notes or mortgages which were being foreclosed; it was not alleged that he had received any money or property through the alleged wrongs; and he was apparently held liable upon the theory that he had permitted himself to be used as a conduit in putting the property beyond the reach of plaintiff and thus had rendered himself liable as a party to the alleged conspiracy.

On April 15, 1925, Thomason gave notice of motion to quash service of summons and vacate the said judgment. [Tr. p. 149.] This notice states "that the defendant, Jasper Thomason, has appeared specially and does hereby appear specially in the above entitled action through the undersigned, his solicitors, for the sole purpose of making the motion hereinafter mentioned; that the said Jasper Thomason has not ap-

peared generally and does not appear generally in this action" [Tr. p. 149], and that he "appears herein solely and only for the purpose of making the said motion on the said ground of want of jurisdiction over his person." [Tr. p. 151.] See, also, praecipe for special appearance, at page 233. The said notice of motion stated that it would be made upon the grounds "that no subpoena in the said cause was ever delivered to the defendant personally and that the only service or attempted service of subpoena herein was made by leaving a copy thereof with Rosamond Mildred Thomason on the 13th day of May, 1921, at a time when the said Rosamond Mildred Thomason was under the age of 18 years and was not an adult person, and that no service or attempted service of subpoena herein was made upon any other person or at any other time than upon the said Rosamond Mildred Thomason on the said 13th day of May, 1921 * * *." [Tr. p. 151.]

Attached to the said notice of motion was an affidavit made by Jasper Thomason in support thereof, in which he thus expressly limited the authority of his solicitors in the premises: "This affidavit is made for the purpose of enabling affiant to make a special appearance in the above entitled action through Wm. T. Kendrick, Esq., and Newlin & Ashburn, Esqs., who are *hereby designated as his solicitors, for the said purpose, which said special appearance shall be made for the sole purpose of moving this court to quash service* of the subpoena herein and vacate and set aside * * * the "Final Decree" entered herein

on the 24th day of March, 1925, *upon the ground that the said court has not and at no time has had jurisdiction over the person of this affiant.*" [Tr. p. 154.]

The motion was also supported by affidavits of Thomason's wife and daughter Rosamond. [Tr. pp. 157-161.]

This motion to quash was submitted before Judge James on April 27, 1925. [Tr. p. 246.] On April 29th Mr. Lewinson made a further affidavit in opposition to said motion [Tr. p. 249], in which he referred to the original return of May 13, 1921, and the amended return of October 4, 1923, and said "said deputy United States marshal who signed said return and said amended return advises affiant that he served said subpoena as in said amended return set forth," *i. e.,* on "Miss Thomason." Mr. Lewinson at the trial relied upon the proposition that the marshal's return was conclusive [Tr. p. 267], and in his memorandum of authorities in opposition to the motion to quash, filed April 29, 1925, contemporaneously with the last mentioned affidavit, he likewise took the position that the amended return of the marshal could not be impeached by defendant Thomason. [Tr. p. 168.]

It was only after service of Thomason's reply brief on April 30, 1925 [Tr. p. 213], wherein counsel well nigh conclusively showed that the return could be impeached [Tr. pp. 185-196], that Mr. Walton or counsel for plaintiff ever conceived the idea of service on anyone but Rosamond.

Having evolved this idea, counsel on May 7, 1925, applied for leave to amend the return *nunc pro tunc* [Tr. p. 268], and presented therewith "in support of the return of the United States marshal, dated May 11, 1921," an affidavit of said W. S. Walton, verified May 7, 1925. In this application counsel applied for leave to file the amended return of October 4, 1923, *nunc pro tunc* and to further amend the return so as to eliminate the statement that process had been served on Miss Thomason and to make it appear that the same was served by leaving a copy with "Jane Doe, whose true name is to the undersigned unknown." [Tr. p. 268.] This application, together with the Walton affidavit, was served upon counsel so appearing specially for Thomason on the said 7th day of May. [Tr. pp. 270, 279.] Whether this was done because of some requirement of Judge James (see King v. Davis, 137 Fed. at 210; 157 Fed. 676), or was designed by counsel for plaintiff as a trap for Thomason's solicitors, does not clearly appear. The memorandum of authorities, which was served as a part of said application, clearly discloses that the same was made for the purpose of defeating the pending motion. It says in part: "Such amendment may be permitted by the court *upon the hearing of a motion to vacate* the judgment even though no notice of such proposed amendment has previously been given to the moving party." [Tr. p. 272.] Appellant's brief herein admits that such was the purpose of the application. At pages 99 and 100 thereof, counsel say:

"In the court below defendant heavily emphasized the point that plaintiff's motion to amend the return was occasioned by defendant's motion to quash, and that the two were argued together; at least somewhat. A fair reading of the record leaves no doubt that this is true, but what of it? * * * Although defendant's brief and affidavits in opposition to the motion to amend were occasioned by the motion to amend, which was occasioned by the motion to quash, they were not filed in support of the motion to quash."

The proposed amendment, which was later filed [Tr. p. 216], and the Walton affidavit recede from the position that service had been made on "Miss Thomason" and attempt to substitute an unnamed married daughter—"Jane Doe" [Tr. pp. 275, 276, 278]—said to be twenty-six years of age at the time of service. [Tr. p. 275.] Referring to the Lewinson affidavit of April 29, 1925, it appears that none of the daughters of Thomason was twenty-six years of age *on May 13, 1921*. [Tr. p. 249.] It also appears from the testimony of Meryle T. Davis, given at the trial, that the oldest daughter was twenty-four years of age on that date. [Tr. p. 265.] Likewise, the affidavit of Verna Thomason Stark, the oldest daughter, shows that she was on that date but twenty-four years of age. [Tr. p. 312.] In their heading of Point III of their brief (pp. 36 and 89 thereof), counsel take the position that the copy was delivered to Meryle T. Davis, but in their argument they do not commit themselves definitely to this proposition.

The affidavits which were considered by Judge James show without contradiction that Jasper Thomason had

a wife and four daughters—Verna, Meryle, Gladys and Rosamond; that on May 13, 1921, Rosamond was the only unmarried daughter and the only one who was a member of Thomason's family or residing therein [Tr. pp. 298, 305, 307, 308.] Verna, Mrs. Stark, resided with her husband in San Pedro [Tr. p. 312]; Mrs. Gladys Schupp resided with her husband in Antelope Valley [Tr. pp. 308, 309]; Jasper Thomason and wife were, on the date of the attempted service, with Mrs. Schupp at her home [Tr. pp. 308, 310]; Meryle T. Davis was also married and was not living with her father at that time. [Tr. pp. 298, 302, 305, 308.]

It appears from the opinion filed by Judge James [Tr. p. 321] that all of the affidavits which had been presented were considered by him and that he accepted as true those allegations of the affidavits presented on behalf of Thomason which were directly in conflict with the affidavit of Walton. He said:

"The *affidavits presented on behalf of said defendant show that the deputy marshal attempted to make service upon a daughter of said defendant, who was at the time seventeen years of age;* that the said daughter had appeared at the door of the residence and that a screen door, which stood between her and the deputy marshal, was latched; that said daughter refused to accept the 'papers' and that the deputy marshal left them on the floor of the porch of the premises." (Italics ours.)

Also:

"The original return and the first amended return were definite that the service was made upon a 'Miss

Thomason,' but the *final amended return* as now presented and filed *shows that the officer must have been without any certain knowledge of the name of the person upon whom he made service when he filed his earlier certificate."* (Italics ours.)

Counsel, inveighing much against the character and *alleged* conduct of defendant Thomason and his relatives, seek by the frequent use of such phrases as "gravest frauds," "steeped in fraud," "conspiracy," "dastardly crimes and frauds," "evading service," and the like, to divert the attention of this court from the real issues involved in the appeal and, by indirection, to persuade this august tribunal to join in counsel's passionate disregard of the real facts disclosed by this record. The cold fact, which a sober examination of this record reveals, is that the District Court never acquired any jurisdiction whatever over the defendant Thomason and that any adjudication of fraud or the like which is contained in the judgment and directed at the defendant Thomason is simply *coram non judice.* He not only was not served with process, but he made no appearance in the action; was not present at the trial even as a witness, and is no more bound by the broad assertions of the complaint and the judgment than he would have been if such judgment had been entered upon the original bill which did not name him as a party. For the purpose of the consideration of this appeal, he must be deemed entirely guiltless of any of the alleged wrongs.

Counsel say that Thomason was guilty of the alleged wrongs because he dodged service of subpoena as a

witness. This argument they base upon the affidavit of Mr. Lewinson wherein he states (necessarily upon hearsay, in its larger part) that Thomason "evaded process." [Tr. p. 250.] This conclusion is based upon the statement that the subpoena was placed in the hands of the marshal for service, without any statement of any efforts made by the marshal to locate the witness. Everyone knows that in these modern days of large cities no marshal or sheriff ever attempts to serve any process except upon information furnished to him by the party desiring it served, and it does not appear that Mr. Lewinson gave the marshal any information whatever. The affidavit also alleges that the Pinkerton Detective Agency "employed numerous operatives to locate said Thomason and serve said subpoena," but what information they had as a basis for their efforts or what, if any, efforts they made are wholly matters of speculation. This assertion of evasion of process is doubtless of a piece with Walton's pretense of showing that Thomason evaded service of the subpoena *ad respondendum*. He says [Tr. p. 275], referring to the subpoena upon the amended supplemental bill, "that prior to being placed in my hands said subpoena had been in the hands of three deputy United States marshals for service, and the same had not been served." This is obviously false, for the subpoena was not issued until May 9, 1921, and each and every of his returns thereon shows that it was delivered *to him* on the said 9th day of May and that only four days expired between the original delivery of the process to him and his al-

leged service thereof. One of his returns is in the form of an affidavit and states that he received the writ on May 9; certainly that affidavit does not purport to speak of the receipt by the marshal, but is directed toward the receipt of the writ by affiant himself. Under those circumstances, it could not possibly have been in the hands of three deputies prior to its delivery to him. In his same affidavit of May 7, he states that he served the writ on May 9, which is the same day it was received by him.

Much is said by counsel for appellant to the effect that Jasper Thomason is guilty of "the gravest frauds" and, inferentially, that he should not be heard to deny service because, forsooth, his daughter, Meryle T. Davis, made a false return of service and his son-in-law, or former son-in-law, H. F. Davis, was the arch criminal who devised and engineered the alleged conspiracy. So far as Mrs. Davis is concerned, it appears from the face of the judgment [Tr. p. 228] that any finding of wrongdoing on her part was made in the absence of jurisdiction over her, or of her being represented as a party to the cause. We do not know what the merits of the judgment are with respect to Mr. Davis, but we do know that no man is to be condemned unheard because, perchance, he may have had a rascal for a son-in-law.

Much is made by counsel of the *alleged or assumed* knowledge of Thomason of the pendency and purpose of this litigation, the claim being that he has gambled with the results of the law suit and should not be re-

lieved from the burden of the judgment, even though the same be void. Such argument comes with poor grace from this plaintiff-appellant. Its original bill shows affirmatively that it is just such reliance upon the necessity of formal service of process that caused all plaintiff's trouble and which lies at the basis of its appeal to a court of equity in this instance. The bill alleges the commencement of the Torrens Title proceeding and also shows an equity suit started in the same jurisdiction for the purpose of accomplishing the same end,—namely, avoiding the plaintiff's mortgage as fraudulent. [Tr. pp. 62-64.] It further appears therein that, although no order for publication of summons was made, copy of the summons and complaint in the said equity action was mailed to plaintiff's predecessor in interest and received by it, and that a like copy was served upon a clerk of plaintiff's predecessor in the state of Utah. The bill alleges that these things were done, the defendants Austin herein (plaintiffs therein), "well knowing or believing that the Delta Land & Water Company *and the plaintiff herein,* being non-resident corporations, would not appear in said action unless due and proper substituted service were made upon them in the manner provided by the Code of Civil Procedure of the state of California" [Tr. p. 63], and that, at or about the time of the delivery of the said summons and the complaint to the said clerk, "the Delta Land & Water Company *and the plaintiff,* through their attorney, made due inquiry to ascertain if service by publication had been ordered by the court in said action, and *upon learning*

that no affidavit or order therefor had been made, did not appear in said action." [Tr. p. 64.] Had they not rested upon their right to technical service of process; had they, knowing of its pendency, appeared in the said equity suit, the alleged fraud of which they now complain could not have been perpetrated and they would not now be in the utterly inconsistent attitude of inveighing against the inaction of Thomason. He was never served with process in their action, and in fact is not shown to have had knowledge of the pendency thereof.

BRIEF OF ARGUMENT.

Point I.

THE RETURN OF SERVICE OF SUBPOENA IS NOT CONCLUSIVE.

Return Not Complete or Self-supporting.

Substituted service must proceed strictly.

Settlemier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110, 1111;

King v. Davis, 137 Fed. 198, 206, 207, 157 Fed. 676;

Harris v. Hardeman, 14 How. 336, 14 L. Ed. 444;

Blythe v. Hinckley, 84 Fed. 228 (C. C., N. D. Cal.).

Returns filed prior to making motion to vacate were insufficient.

[Tr. pp. 216-218.]

Affidavit presented with proposed amendment was made in support of previous return.

[Tr. pp. 268, 271.]

The amendment and affidavits are to be construed together.

Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. Ed. 272, 277;

Fountain v. Detroit etc. Co., 210 Fed. 982.

Amendment found to be untrue before its filing.

[Tr. pp. 320-322.]

Leave to amend could, under these circumstances, have been properly denied.

Phoenix Ins. Co. v. Wulf, 1 Fed. 775, 779;

King v. Davis, 137 Fed. 198, 210, 157 Fed. 676;

Bayley, Petitioner, 132 Mass. 457;

Wolcott v. Ely, 2 Allen 338;

Boyd v. Dean, 8 Sask. L. 1;

Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. Ed. 272, 277;

Fountain v. Detroit etc. Co., 210 Fed. 982.

Return, Though Complete on Its Face, May Be Impeached.

Formal legal notice to defend is essential to due process.

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, 572;

Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699, 705;

Simon v. Southern Ry. Co., 236 U. S. 115, 59 L. Ed. 492, 497.

There is no "absolute verity" to a record of a void judgment.

Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444;
1 Freeman on Judgments, Sec. 228, p. 448 (5th Ed.);
3 Freeman on Judgments, Sec. 1201, p. 2494;
Mechanical Appliance Company v. Castleman, 215 U. S. 437, 54 L. Ed. 272;
1 Foster's Fed. Prac., Sec. 167a;
Blythe v. Hinckley, 84 Fed. 228, 111 Fed. 827;
Peper Automobile Co. v. American Motor Car etc. Co., 180 Fed. 245 (C. C. E. Dist. Mo.);
Higham v. Iowa etc. Assn. (C. C. Mo.), 183 Fed. 845;
Parmalee Co. v. Aetna Life Ins. Co., 166 Fed. 741 (C. C. A., 7th Cir.);
Joseph v. New Albany etc. Co., 53 Fed. 180 (distinguished);
Von Roy v. Blackman, Fed. Cas. No. 16,997, 3 Woods 98,100 (distinguished);
Trimble v. Erie Elec. Motor Co., 89 Fed. 51 (distinguished);
Nickerson v. Warren etc. Co., 223 Fed. 843;
Bradley Mfg. Co. v. Burrhus, 135 Ia. 324.

Action against marshal is not an adequate remedy. [Tr. pp. 277-278.]

3 Freeman on Judgments, Sec. 1229, p. 2558.

Point II.

The Court Has No Power to Impose Conditions Upon the Granting of a Motion to Vacate, Where There Has Been No Actual Service.

No Knowledge on Thomason's Part Shown.

[Tr. pp. 258, 308, 257, 309.]

Actual Knowledge Is Legally Inconsequential.

32 Cyc. at 462;
National Metal Co. v. Greene Con. etc. Co., 11 Ariz. 110;
Wilmer v. Pica, 118 Md. at 550;
Caldwell v. Glenn, 6 Rob. (La.) 9;
Osborne & Co. v. Columbia etc. Corp., 38 Pac. 160, 161 (Wash.);
Harrell v. Mexican Cattle Co., 73 Tex. at 615;
Bradley Mfg. Co. v. Burrhus, 135 Ia. 324;
Savings Bank v. Authier, 52 Minn. 98;
Wilcke v. Duross, 144 Mich. 243 (syllabus);
O'Connell v. Gallagher, 104 N. Y. App. Div. 492;
Kochman v. O'Neill, 202 Ill. 110;
Mass. etc. Assn. v. Lohmiller, 74 Fed. 23 (C. C. A., 7th Cir.) (distinguished);
Cowden v. Wild Goose etc. Co., 199 Fed. 561, 565 (distinguished);
Martin v. Gray, 142 U. S. 236 (distinguished).

No Waiver of Statute of Limitations Necessary.

Federal equity courts apply state limitations only to the extent that it is equitable.

1 Foster's Fed. Prac., Sec. 181, pp. 1050, 1051;
Kirby v. Lake Shore etc. R. R. Co., 120 U. S. 130, 30 L. Ed. 569, 572;
Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 206.

Filing of bill tolls statute only where followed by diligent effort to effect service.

U. S. v. American Lumber Co., 85 Fed. 827 (9 C. C. A.);
U. S. v. Miller, 164 Fed. 444 (Dist. Ct. Ore.).

No Offer to Defend Is Necessary.

Davidson Bros. Marble Co. v. U. S. *ex rel.* Gibson, 213 U. S. 10, 53 L. Ed. 675.
Bacon v. Federal Reserve Bank, 289 Fed. 513, 515.

Point III.

THE EVIDENCE IS SUFFICIENT TO REBUT THE MARSHAL'S RETURN AND AFFIDAVIT.

Copy of Writ Was Delivered to Rosamond.

[Tr. pp. 153, 157, 160, 216, 217, 218, 228, 249, 253, 258, 264, 265, 262, 263, 266, 298, 302, 305, 307, 308, 309, 310, 312, 320, 322.]

(See, also, Stipulation for Diminution.)

This Court Revises Only Palpable Errors of Fact.

U. S. v. Marshall, 210 Fed. 595 (8 C. C. A.);
Schlafly v. U. S., 4 F. (2d), 195, 198.

Oral Hearing Not Proper Procedure.

Mechanical Appliance Company v. Castleman, 215 U. S. 437, 54 L. Ed. 272;
Higham v. Iowa etc. Assn., 183 Fed. 847;
Peper Automobile Co. v. American Motor Sales Co., 180 Fed. 245;
American Cereal Co. v. Eli Pettijohn Cereal Co., 70 Fed. 276;
Wall v. C. & O. Ry. Co., 95 Fed. 398;
Benton v. McIntosh, 96 Fed. 132.

Service on Married Daughter Not Compliance With Rule 13.

Married daughters were not residing in Thomason's home.

[Tr. pp. 298, 305, 308, 302, 261.]

Service upon a married daughter not residing in defendant's home is not a service upon a member of defendant's family.

Heinemann v. Pier, 85 N. W. 646 (Wis.);
Colter v. Luke, 108 S. W. (Mo. App.);
Poor v. Hudson Ins. Co., 2 Fed. 432, 438, 25 C. J. at 664;
Jackson v. Smith, 200 Pac. 542 (Okla.).

Point IV.

Rosamond Thomason Was Not an Adult Person Within the Purview of Equity Rule 13.

"Adult Person" Means One of Full Legal Age.

1 Street's Fed Eq. Prac., Sec. 595, at 371;

Banco de Sonora v. Bankers' Mut. Cas. Co., 100 N. W. 532, 535 (Iowa);

Schenault v. State, 10 Tex. App. 410, 411, 1 C. J. at 1403.

Cal. C. C., Sec. 25:

"Minors, Who Are. Minors are: 1. Males under twenty-one years of age; 2. Females under eighteen years of age."

Cal. C. C., Sec. 27:

"Adults, Who Are: All other persons are adults."

There Was No Showing That Rosamond Was an Adult Within Appellant's Definition.

There are no presumptions in favor of the return.

Harris v. Hardeman, *supra;*

Blythe v. Hinckley, *supra.*

It is incumbent upon the officer to affirmatively show in his return full compliance with the rule.

King v. Davis, *supra;*

Blythe v. Hinckley, *supra;*

Harris v. Hardeman, *supra.*

Point V.

DEFENDANT'S OPPOSITION TO THE MOTION TO AMEND RETURN OF SERVICE DID NOT WORK A GENERAL APPEARANCE.

Appellant's Argument Denies Any Substantial Efficacy to Special Appearance.

Under appellant's theory, defendant's motion would have been defeated by a showing of service upon some-

one other than Rosamond, had defendant not opposed the motion; likewise, his motion was defeated by reason of his opposing plaintiff's attempt to defeat his motion by amending the return.

The facts pertaining to the alleged general appearance:

[Tr. pp. 233, 270, 274, 279, 280, 281, 291, 292, 314, 320, 296.]

Appellant's Authorities Are Opposed to Federal Rule.

Stubbs v. McGillis, 44 Colo. 138 (distinguished);

Bestor v. Inter-County Fair, 135 Wis. 339 (distinguished).

Federal Rule Is That Waiver of Special Appearance Is Matter of Intent.

Southern Pac. Co. v. Arlington Heights Fruit Co., 191 Fed. 101 (C. C. A., 9th Cir.);

Kelley v. T. L. Smith Co., 196 Fed. 466 (7 C. C. A.);

4 C. J. at 1333;

2 R. C. L. at 322;

Sterling Tire Corp. v. Sullivan, 279 Fed. 336 (distinguished);

Dahlgren v. Pierce, 263 Fed. 841 (C. C. A., 6 Cir.);

Grable v. Killits, 282 Fed. 185;

Garvey v. Compania etc., 222 Fed. 732 (Dist. Ct. Tex.);

General Investment Co. v. Lake Shore etc. Ry. Co., 260 U. S. 261, 67 L. Ed. 244 at 252;

Salmon Falls Mfg. Co. v. Midland etc. Co., 285 Fed. 214;

Pine Hill Coal Co. v. Gusicki, 261 Fed. 974, 977;

Yanuszauckas v. Mallory S. S. Co., 232 Fed. 132, 133;

Davenport v. Superior Court, 183 Cal. 506.

Appellant's authorities distinguished:

Everett Ry. etc. Co. v. U. S., 236 Fed. 806;

Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495;

Briggs v. Stroud, 58 Fed. 717;

Brookings State Bank v. Federal Reserve Bank, 291 Fed. 659;

Placek v. American Life Ins. Co., 288 Fed. 987.

ARGUMENT.

Point I.

THE RETURN OF SERVICE OF SUBPOENA IS NOT CONCLUSIVE.

Return Not Complete or Self-supporting.

In discussing this point, counsel for appellant assume that the cause is in the same state as if our motion to quash had been originally directed to the last amended return, filed herein on July 15, 1925. But such is not the case. At the time of the submission of the motion, the amendment showing service on "Jane Doe" had not been suggested. The motion

was directed at the returns then on file, the last of which, filed October 12, 1923 [Tr. p. 217], was neither complete nor self-supporting.

Constructive or substituted service must proceed strictly in accordance with the statutory authority (Settlemier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110, 1111), and the return of service must affirmatively show performance of all the acts necessary to acquiring jurisdiction in this vicarious manner. Settlemier v. Sullivan, *supra;* King v. Davis, 137 Fed. 198, 206, 207, 157 Fed. 676; Harris v. Hardeman, 14 How. 336, 14 L. Ed. 444.) In the King case, *supra,* a return was held insufficient because it did not state that the defendant's wife was a member of his family. In the Settlemier case the return was held fatally defective because of failure to state that the officer was unable to effect personal service upon the defendant. In Blythe v. Hinckley, 84 Fed. 228 (C. C., N. D., Cal.), Circuit Judge Morrow held, or strongly intimated, that a return was insufficient which stated that service had been made upon an adult "who is a resident in the place of the abode" of defendant, because the return did not state that she was a member or resident of the family of said defendant.

The return in question (October 12, 1923) did not state, except by way of recital, that Miss Thomason was an adult person at the time of service. It was equivocal as to whether she was a person upon whom service could be legally made, for it stated that she was then "a member *or* resident in the family of Jasper Thomason." The disjunctive of course does not

comply with the statutory requirement. It merely shows that the officer is in doubt as to the fact. The said return likewise shows that the process was left "at the dwelling house *or* usual place of abode" of defendant,—again evincing an unwillingness on the part of the officer to definitely commit himself as to facts.

In Nickerson v. Warren City etc. Co., 223 Fed. at 845 (cited by appellant), it is said:

> "Whenever the question of service is raised in determining the validity of a judgment obtained by default and without notice in fact to the defendant, and because of this without opportunity to present the defense, the record may properly be closely scrutinized to see that there was valid service."

The earlier returns of the marshal were more clearly subject to attack than the one which we have just discussed. [Tr. pp. 216-218.] These matters having been called to the attention of counsel and the court [Tr. p. 185], the affidavit of Walton and the application for leave to further amend were filed "in support of the return of the United States marshal dated May 11, 1921." [Tr. p. 268.] The court's attention was at that time called by plaintiff's counsel to authorities which they claimed to warrant the use of affidavits in support of the marshal's return. [Tr. p. 271.] Judge James had all these matters before him in considering the motion to quash, and, in the written opinion in which he authorized the amending of the

return, he likewise found the said amendment to be untrue. [Tr. pp. 320-322.]

Counsel thus predicate the argument upon an amended return established and found prior to its filing to be false.

Judge James could very properly have denied the application for leave to amend upon the ground which he states in his opinion as the basis for his granting the motion to vacate, namely, untruth of the facts stated in the return. (Phoenix Insurance Co. v. Wulf, 1 Fed. 775, 779; King v. Davis, 137 Fed. 198, 210, 157 Fed. 676; Bayley, Petitioner, 132 Mass. 457; Wolcott v. Ely, 2 Allen 338; Boyd v. Dean, 8 Sask. L. 1.) Under these circumstances appellant cannot complain of the fact that Judge James, contemporaneously with permitting the filing of the amended return, looked through its *pro forma* aspect to the real substance of untruth which lay behind.

It is likewise true that the said amended return must be read in conjunction with the affidavits which were filed in support of it and in opposition to it upon the motion for leave to amend. (See cases last cited above; also Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. Ed. 272, 277; Fountain v. Detroit etc., Co., 210 Fed. 982.) Thus read, the amended return again turns out to be wholly incomplete and not self-supporting. We say incomplete, for, as found by Judge James, it appears that the officer does not know whom he served. We say "not self-supporting" because it affirmatively appears that not only does the

officer not know the identity of the person to whom he attempted to deliver the papers, but because it also appears, as found by Judge James, that the facts stated in his affidavit are untrue. True, Mr. Walton averred stoutly, "I know of my own knowledge that the facts stated in said return and said amended return are true" [Tr. p. 278], but it very clearly appears from the affidavit itself that his alleged knowledge was gained wholly from conversation with an unnamed person and that he neither knows the age, the identity or the relation to appellee of the person mentioned in his affidavit, except as he acquired the same from his conversation with that person, if such conversation did take place. He does not even venture to name the individual with whom the conversation is claimed to have occurred. The original return shows clearly that he did not understand it to be Meryle Davis, the person whom counsel now claim to have been served; in that return, he deliberately struck out the words "and Meryle T. Davis," which he had previously inserted therein. Judge James said: "The final amended return as now presented and filed, shows that the officer must have been without any certain knowledge of the name of the person upon whom he made service when he filed his earlier certificate."

It is thus apparent that the premise upon which counsel base their argument of the conclusiveness of the marshal's return is wholly non-existent,—the return is neither complete nor self-supporting.

Counsel virtually concede that a return which is not so complete and self-supporting can be impeached upon a motion such as the one here involved.

Return, Though Complete on Its Face, May Be Impeached.

But the large preponderance of Federal authorities and of sound reasoning clearly establishes that the return, even though complete and self-supporting upon its face, may be impeached in such a proceeding as this.

Realizing the import of the decisions which we are about to cite, counsel for appellant seek to draw a distinction between those cases which involve service by constructive process upon non-residents and service by substitution upon residents. The distinction is fundamentally unsound, for it is of the essence of due process of law that service of notice in the manner prescribed by law must be made before any man can be held to personal obligation upon any judgment.

Speaking of the requisites of due process of law, the Supreme Court in Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, 572, said of judicial proceedings:

> "To give such proceedings any validity, there must be a tribunal competent by its constitution,—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

Again, the court speaks of it as a "principle of natural justice which requires a person to have notice of

a suit before he can be conclusively bound by its result" (p. 571).

In Mexican Central R. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699, 705, the court said:

> "But it is well settled that no court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears."

In Simon v. Southern Ry. Co., 236 U. S. 115, 59 L. Ed. 492, 497, it was held that service of process within the state in the manner prescribed by statute was not effective in giving a court of the state jurisdiction over a suit against a foreign corporation doing business within the state as to a cause of action arising in another state, and, speaking of judgments rendered upon service other than that prescribed by law, the court said:

> "Such judgments are not erroneous and not voidable, but, *upon principles of natural justice,* and *under the due process clause* of the 14th Amendment, are *absolutely void.* They constitute no justification to a plaintiff who, if concerned in executing such judgments, is considered in law as a mere trespasser."

And again (p. 501):

> "As the company made no appearance, the default judgment was void. Being void, the plaintiff acquired no rights thereby and could be enjoined

by a Federal Court from attempting to enforce what is *a judgment in name,* but *a nullity in fact.*" (Italics ours.)

It would be as logical to say that jurisdiction could be acquired in an attachment suit, within the purview of the Pennoyer case, *supra,* by making a mere return of seizure of the *res* without actually following the prescribed process for such seizure, as to say that personal judgment can be rendered against one who is physically within the jurisdiction without having given him the notice prescribed by law. The foregoing cases disclose, what is self-evident, that jurisdiction over the person is just as essential as jurisdiction over the subject matter, and that in each case it is jurisdiction in the "absolute" sense, jurisdiction required by the concepts of due process of law.

No "Absolute Verity" to a Record of a Void Judgment.

Counsel for appellant say that the only objection to the conclusive rule as applied to returns of service is that urged against denying a man his day in court, and they discuss the matter as if this were a mere rule of convenience to be applied at the discretion of the court. This, of course, is but a wading in the warm shallows. A plunge into the depths takes one into the cold waters of constitutional law.

That no court can evade the 14th Amendment *by merely declaring,* through its officers or its own decree, that it has jurisdiction, where the requisites of due process have not been observed, is very clearly

established by the reasoning of Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444. The court there held insufficient a return of substituted service which did not comply with the state statute or the existing rule of the United States Circuit Court, and for that reason pronounced the judgment void. The court said in part:

> "In reviewing the decision of the Circuit Court, it should be borne in mind, as a rule to guide and control our examination, that the judgment impugned before that court was a judgment by default, and that in all judgments by default, whatever may affect their competency or regularity, every proceeding, indeed, from the writ and indorsement thereon, down to the judgment itself, inclusive, is part of the record, *and is open to examination.* * * * In reference to the first inquiry, it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was a party or privy; that *no person can be in default with respect to that which it never was incumbent upon him to fulfill.* The court entering such judgment by default could have no such jurisdiction over the person as to render such personal judgment, unless, by summons, or other process, the person was legally before it. A court may be authorized to exert its powers in reference either to persons or things—may have jurisdiction either *in personam* or *in rem,* and the existence of that jurisdiction, as well as the modes of its exercise, may vary materially in reference to the subject matter to which it attaches. Nay, they

may be wholly inconsistent; or at any rate, so much so as to not be blended or confounded. This distinction has been recognized in a variety of decisions, in which it has been settled that a judgment depending upon proceeding *in personam* can have no force as to one on whom there has been no service of process, actual or constructive; who has had no day in court, and no notice of any proceeding against him. That *with respect to such a person, such a judgment is absolutely void; he is no party to it, and can no more be regarded as a party than can any and every other member of the community.* * * *" (Italics ours.)

Speaking of the contention that the record cannot be disputed because it "imports perfect verity," the court quoted with apparent approval the following language:

"But it is contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and therefore the supposed record is, in truth, no record. *If the defendant had not proper notice of, and did not appear to, the original action,* all the state courts, with one exception, agree in opinion that *the paper introduced as to him is no record, but if he cannot show, even against*

the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense, by a process of reasoning that, to my mind, is little less than sophistry. The plaintiffs, in effect, declare to the defendant—the paper declared on is a record, because it says you appeared; and you appeared because the paper is a record. *This is reasoning in a circle.* The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. *Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction,* and he ought not, therefore, to be estopped from proving any fact which goes to establish the truth of a plea alleging the want of jurisdiction." (Italics ours.)

Counsel for appellant are not much impressed with the "absolute verity" proposition, as appears from page 46 of their opening brief. They rather invoke a rule denying the benefit of due process of law upon a pure argument of convenience, namely, the greatest good for the greatest number in the expediting of the processes of courts of justice. To state it in its true light is to refute the argument without further discussion.

The general rule upon the subject is stated in 1 Freeman on Judgments, Sec. 228, page 448 (5th Ed.), as follows:

"* * * the decided preponderance of authority justifies, or rather requires, a court, on motion being made to vacate its judgment because

it was without jurisdiction over the person of the subject matter, to inquire whether such was the fact, and if so, to grant the relief sought. When a motion to vacate a judgment, on the ground that defendant had never been served with process, is made, it is doubtless incumbent on the moving party to clearly prove his case, especially where the judgment recites due service of process; but *to hold that he must establish it by the record is to deny him relief in all cases in which relief is necessary;* for if a judgment record proclaims its own invalidity, it must be denied effect everywhere, and it is of little or no consequence whether it is formally set aside or not, generally, though there is a return showing that process was served, this return may be contradicted on motion to vacate the judgment and the motion granted, if, not withstanding the return, the court is convinced that it had not acquired jurisdiction over the defendant."

3 Freeman, Sec. 1201, page 2494:

"So the remedy by motion is an adequate method of securing relief from a judgment regular on its face, on the ground that there was no service of process, though the sheriff's return shows service, unless there be special reasons in the particular case why the statutory remedy is inadequate."

The preponderance of authoritative Federal decisions is to the same effect.

Mechanical Appliance Company v. Castleman, 215 U. S. 437; 54 L. Ed. 272. The case having been removed from the state court to the Federal Court, the

Circuit Court ruled that the return of the sheriff was conclusive as to service upon the agent of a corporation stated by him to be doing business within the state. The circuit judge refused to consider the affidavits which were tendered for the purpose of impeaching the sheriff's return. The ruling was reversed, the Supreme Court saying in part:

> "The circuit court should have considered the question upon the issues of fact raised, as to the presence of the corporation in Missouri and the authority of the agent upon whom service had been attempted. * * * These affidavits are made part of the record by a bill of exceptions, and we think they should have been considered upon the question of jurisdiction.
>
> "As we have already indicated, the learned circuit court was in error in holding that the return of the sheriff in the state court concluded the parties."

The case went up from the Eastern District of Missouri. The Supreme Court declined to follow the decision in Smoot v. Judd, 184 Mo. 508, upon which appellant lays great stress in the case at bar.

1 Foster's Federal Practice, Section 167a, says:

> "If the marshal or his deputy make the service, his unverified return is sufficient. This may be contradicted, although there is a remedy by an action against the officer for a false return. The marshal's return, that the corporation served was transacting business within the district, can be contradicted; so can his return that the person

> on whom the service was made was authorized to represent the defendant for that purpose."

The leading case in this jurisdiction is Blythe v. Hinckley, 84 Fed. 228, decided by Judge Morrow sitting in Circuit Court. The discussion of the point here involved begins on page 239. The return showed service on Florence Blythe Hinckley, "by delivering to and leaving with Mrs. Harry Hinckley, an adult person, who is a resident in the place of abode of Florence Blythe Hinckley, said defendant named herein, at the county of Alameda in said district, an attested copy thereof, at usual place of abode of said Florence Blythe Hinckley, one of the defendants herein." Judge Morrow said:

> "It will be observed that the return does not show that Mrs. Harry Hinckley, to whom a copy of the subpoena was delivered, was a member or resident of the family of Florence Blythe Hinckley; and it is contended that this departure from the requirement of the rule is fatal to the service, and therefore renders the decree absolutely void. It appears that Mrs. Harry Hinckley is the wife of the brother of the deceased husband of the defendant Florence. The difference between leaving a copy of a subpoena at the dwelling house or usual place of abode of the defendant with some adult person who is a member or resident of the family of the defendant, and leaving it with a person who is a resident of the place of the abode of the defendant, is certainly very great, and might be very important. * * * But it is said that the return of the marshal is that he has made personal service of the subpoena on

> Florence Blythe Hinckley, and that, as there is nothing in his certificate as to the method of making the service inconsistent with this return, a good and sufficient service will be presumed. It is also further contended that, if the return is defective in this respect, the defect has been cured by the recital in the decree that the subpoena 'had been duly and regularly served within the Northern district of California upon the respondent in said cross bill of complaint.' The doctrine here invoked to support the decree would be applicable if the decree were now being subjected to a collateral attack. In such a proceeding every intendment would be indulged in support of the decree, and whatever appeared in the record as having been done would be presumed to have been rightfully done."

It will be observed from the court's discussion that it in effect held delivery to a person who in point of fact would in all probability deliver the subpoena to the defendant, was not sufficient in the absence of a showing of a strict compliance with the equity rule. Mrs. Harry Hinckley, to whom the subpoena was delivered, was the sister-in-law of the defendant and the return showed that she was an adult person and residing in the usual place of abode of the defendant. Every argument which plaintiff makes in the instant case relative to the actual probability of the defendant having received the subpoena would be equally applicable to the Hinckley case. But the point of the decision is that the Supreme Court has prescribed by its equity rule 13 the conditions which it deems neces-

sary to warrant the assumption that a substituted service by leaving copy with a third person would actually reach the defendant, and those conditions are (1) that the copy be left with an adult person, (2) who is a member of or resident in defendant's family, and (3) at the usual place of abode or dwelling house of the defendant. This is a method of substituted service. All authorities agree that such method of service must be strictly pursued.

Counsel for appellant seek to distinguish the Blythe case by classing it as "not a motion to vacate, but to let in and defend." In this respect counsel have, we think, misconceived the true purport of the case. At the bottom of page 233 the statement of facts made by the court says that Florence Blythe Hinckley "filed a petition to have the judgment of July 3, 1897 set aside and vacated on the ground that she had never been served with any process or received a copy of any process issued upon said cross bill; that she had never seen or received said cross bill or a copy thereof; that no cross bill or any copy thereof, or any process or any copy of any process, had ever been delivered to her or left at her dwelling house or usual place of abode with any adult person who was ever a member or resident in her family." At page 239:

> "and it is contended that this departure from the requirement of the rule is fatal to the service and therefore renders the decree absolutely void."

The court says nothing about the application being one for leave to come in and defend. The only language of the case from which such an intimation could

be drawn is that found at page 240, upon which counsel for appellant herein rely. The court was there considering the question of collateral attack and attendant presumptions. The language quoted by appellant herein is, we think, *dictum* or, at best, *arguendo.* Certainly the court did not seek to impose upon Mrs. Hinckley any condition such as that of showing meritorious defense or filing an answer or otherwise submitting to the jurisdiction; the conclusion of the decision, so far as she is concerned, is this:

> "It follows from these considerations that the court, in the exercise of a sound discretion, if not recognizing an absolute right, must set aside and vacate the decree of July 3, 1897, as far as it affects the interests of the defendant Florence."

The report of this same case in 111 Fed. 827, at 835 and 836, shows plainly that our construction of the decision is correct. It is there affirmatively disclosed that Judge Morrow's order quashed service without condition and dismissed the action upon the cross bill as to the said defendant Florence Blythe Hinckley.

Counsel likewise seek to distinguish the Blythe case upon the ground that the court held the return of service to be defective upon its face. This is not quite accurate; the court said:

> "If the court is limited in its inquiry to the subpoena and its return, it is difficult to see how it can find that the requirements of the rules as to the service of process have been followed with such precision in obtaining jurisdiction over the defendant that it would be justified in refusing to set aside the decree."

The court then entered into an examination of the affidavits submitted for the purpose of impeaching the return as to the statement therein that Mrs. Harry Hinckley was a resident in the place of abode of Florence Blythe Hinckley and found, as a matter of fact, that the latter was not a permanent resident at the place where the subpoena was served and that therefore the equity rule had not been complied with. The decision is a clear recognition of the right to impeach a false return.

Peper Automobile Co. v. American Motor Car Etc. Co., 180 Fed. 245 (C. C. E. Dist. Mo.) is directly in point. That was a motion to quash service of summons in a law case, on the ground of want of jurisdiction over the person by reason of failure to serve the writ. Judge Pollock said, in part:

> "However, the question here presented is not one which arises as to the jurisdiction of the court over the subject-matter of the litigation. Jurisdiction over the subject-matter is conceded. The question here presented touches only this one matter: *Did the court by the service of the summons, as shown by the return of the marshal, acquire jurisdiction over the person of the defendant? The determination of this question must rest on the actual facts, and not upon the accuracy of the decision of the marshal of the question* as to whether the defendant was at the date of the service doing business in the state and district, and, if so, whether the person on whom the writ was served was the representative of the defendant in the doing of such business, for as defendant, by the declaration of plaintiff made for the pur-

pose of showing the jurisdiction of the court over the subject-matter of the litigation, is alleged to be a corporate citizen of the state of New York, it must of necessity have been engaged in doing business in this jurisdiction, else it was not amenable to the process of this court without its consent." (Italics ours.)

Higham v. Iowa etc. Assn. (C. C. Mo.) 183 Fed. 845. The court had under consideration a return of service upon a foreign insurance company. It said in part:

> "In the Federal court it is proper practice to try the question of the sufficiency of the service of a summons by motion to quash the return, supported by affidavit, and in the absence of statute a Federal court is not required by the act of conformity to follow the state practice of trying this question."

Speaking of statutory requirements with respect to service of summons upon local officers for the purpose of giving jurisdiction over foreign corporations, the court said:

> "Such provisions, however, must not encroach upon *that principle of natural justice which requires notice of a suit to a party before he can be bound by it.* * * * The question always turns upon the character of the agent or representative; whether he is such that the law will imply the power and impute the authority to him. *It is always open to show* that the agent stands in no representative character to the company, that his duties are limited to those of a subordi-

> nate employe, or to a particular transaction, or that his agency had ceased when the matter in suit arose." (Italics ours.)

Frank Parmalee Co. v. Aetna Life Insurance Co. 166 Fed. 741 (C. C. A. 7th Cir.) grew out of a policy issued by defendant, insuring plaintiff against liability for accidents. The Parmalee Company was sued for personal injuries and service within the territorial jurisdiction was attempted by leaving a copy with one Gany, who, according to the sheriff's return, was Secretary of the said company. No other attempted service was made. The Parmalee Company never learned of the alleged service until after its default had been entered in the action. It accidentally learned of the default and transmitted to the insurer all of the facts in its possession. The insurer declined to assume the defense of the suit upon the ground that the insured had failed to furnish it within the time specified in the policy with a copy of process served. The action proceeded to judgment, and the Parmalee Company sought by the case reported in 166 Fed. to recover from the Insurance Company upon the said policy. The Insurance Company took the primary position that the sheriff's return was conclusive in the damage action upon the Parmalee Company, and that, as it could not be there heard to deny service of process, it could not in the instant action be heard to deny the truth of the sheriff's return. The Circuit Court of Appeals held that the Parmalee Company was not bound in the damage action by the sheriff's return but that the same could have been impeached, and that

by furnishing promptly to the insurance company all the information it had, the assured had performed its duty under the policy. The court, speaking through Judge Grosscup, said in part:

> "But is this a case in which the return, in the Whelock case, cannot be challenged? Many cases are cited by defendant in error, illustrating the circumstances under which an officer's return upon a summons may not be contradicted. Bank of Eau Claire v. Reed, 232 Ill. 238, 240, 83 N. E. 820, 122 Am. St. Rep. 66; Brown v. Kennedy, 82 U. S. 600, 21 L. Ed. 193; Trimble v. Erie Electric Motor Co. (C. C.) 89 Fed. 51; Joseph v. New Albany etc., Co. (C. C.) 53 Fed. 180; United States v. Gayle (D. C.) 45 Fed. 107; Walker v. Cronkite (C. C.) 40 Fed. 133; Hunter v. Stoneburner, 92 Ill. 75, on page 79; Fitzgerald v. Kimball, 86 Ill. 396, 397; Reddish v. Shaw, 111 Ill. App. 337, 338; Irvin v. Smith, 66 Wis. 113, 27 N. W. 35, 28 N. W. 351; 18 Enc. Pleading & Practice, p. 967. But none of these cases bear any analogy to the case under review. Surely had appropriate action been taken in the action in which the summons was issued, the verity of the return might have been challenged and tried."

Counsel at bar would evade this decision upon the ground that the question arose collaterally. The distinction is not sound, for the question decided by the Circuit Court of Appeals was whether the Parmalee Company could in the original action have impeached the sheriff's return, and its rights and duties with respect to the insurance company were determined in the light of what its rights were in the matter of im-

peaching the sheriff's return in the damage action. In other words, the court decided in the case against the insurance company that the Parmalee Company directly, or through the insurance company, could have shown in the original action that the sheriff's return was false.

Nor was the force of this decision weakened by the second ground therein contained, namely, that, assuming the summons to be one that should have been forwarded to the defendant, there was in any even substantial compliance with the conditions of the policy. It is at most a resting of the decision upon two separate grounds, and if either of them be dictum it is the latter ground.

Counsel say that the decision must be so construed because of its approval of Joseph v. New Albany etc. Co., 53 Fed. 180, a case upon which appellant heavily relies herein. All that was said about that case was that it was one of a number "illustrating the circumstances under which an officer's return upon a summons may not be contradicted." The Joseph case was decided in the Circuit Court, District of Indiana. The language of the decision clearly distinguishes it from the general current of Federal authorities, for it there appears that by court rule the Federal judge was bound to follow the state statute.

> "Whatever may be the rule in other states in regard to the effect of the return of an officer in executing mesne or final process, I think it the settled law in this state that the return of a sheriff showing that he has served the writ in the manner

prescribed by the statute, for the purpose of giving the court jurisdiction, is conclusive against a collateral attack. * * * It is not necessary to determine what the rule of law touching the question under consideration may be in other jurisdictions. This court has, by rule, adopted the statute of this state in regard to the service of process in actions at law; and therefore the statute of this state, as interpreted by its highest judicial tribunal, must rule the question in actions at law in this court."

The Parmalee case arose in the Circuit Court of the Northern District of Illinois. In the light of these facts, it is clear that the Circuit Court of Appeals in the Parmalee case distinguished the Joseph case upon the ground that the latter was a marked exception to the general rule.

Appellant relies on Von Roy v. Blackman, Fed. Cas. No. 16,997; 3 Woods 98, 100. While the court does use the language quoted at pages 51-52 of appellant's brief, that language is justly characterized in Note 2 to Sec. 167a of Foster's Federal Practice (page 970) as dictum; for the court actually held the return of service to be defective on its face because of the fact that it showed that the copy had been left with a person residing at defendant's domicile but did not show him to be a member of the family.

Trimble v. Erie Electric Motor Co., 89 Fed. 51, apparently proceeds, as did the Joseph case, upon a construction of state law. While it is not clear, the inference from Circuit Court Rule 86, which is quoted on page 51, and the whole tenor of the decision is that

it was a question of state law pure and simple which was under consideration. That case was decided in the Western District of Pennsylvania in 1898 and relied upon a number of early Pennsylvania decisions. In 1915 the case of Nickerson v. Warren etc. Co., 223 Fed. 843, was decided in the Eastern District of Pennsylvania, the court there saying:

> "Whenever the question of service is raised in determining the validity of a judgment obtained by default and without notice in fact to the defendant, and because of this without opportunity to present the defense, the record may properly be closely scrutinized to see that there was valid service. * * * The earlier cases in Pennsylvania laid down the doctrine that the return of the sheriff could not be questioned, but for the purpose of bringing the defendant into court was conclusive, and, as it must be accepted as verity, the defendant was remitted to his plea in abatement of his action for a false return. *This rule has, however, latterly been somewhat relaxed, and the principle has been modified,* at least to the extent that where the return of the sheriff is not in itself complete, in the sense of not being wholly self-supporting, there a motion would be entertained, and the facts inquired into and determined by the court. This modification implied the converse, that when the return is complete and self-supporting, the old rule still pertains. *The rulings have nevertheless shown a drift, and the courts avow it in the direction of permitting an inquiry into the real facts, and allowing the return to stand or setting it aside in accordance with the facts as found by the court.* Park Bros. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334; Fulton v. Asso-

> ciation, 172 Pa. 117, 33 Atl. 324; Hagerman v. Empire Slate Co., 97 Pa. 534.
>
> This is the attitude of the courts of the United States." (Italics ours.)

The court then proceeded to inquire into the verity of the facts shown by the marshal's return, held it to be substantially true but defective in form, and gave leave to amend the same.

In the case of Bradley v. Burrhus, 135 Ia. 324, the court gives this common sense reason for its holding that the return can be impeached:

> "as the court would not enter a judgment upon a false return, if advised in advance, it should be free to set aside, as between the parties, at least, when subsequently the falsehood is made to appear."

Action Against Marshal Not Adequate Remedy.

The case of Smoot v. Judd, 184 Mo. 508, and other state decisions upon which appellant relies, proceed upon one of two grounds: either (a) the absolute verity of the record (which theory is pretty well exploded by the Harris case, *supra*), or (b) the proposition that an action against the marshal is an adequate remedy. Of this last mentioned view, 3 Freeman on Judgments, Sec. 1229, page 2558 says:

> "But the obvious and conclusive answer to this line of argument is thus briefly stated in the opinion of the Supreme Court of Tennessee: 'The action for a false return is an inadequate remedy for such an injury; for it might be that after a ruinous sacrifice suffered in the payment of a

> judgment so recovered, and the delay and expense of litigation with the officer who made the false return, he might be unable to make a proper indemnity, or succeed in evading his liability'."

The Smoot case is an excellent example of the adequacy (?) of the remedy upon the officer's bond. The injured party was there relegated to such an action, recovering a judgment for $1.00 against the sheriff, and was by the Supreme Court of Missouri denied any relief in equity. It is this decision which the Supreme Court of the United States declined to follow in the Mechanical Appliance case, *supra.* The case at bar is a striking example of the inadequacy of such a remedy. The amended returns filed on October 4, 1923, October 12, 1923 and July 15, 1925 were made by one who had ceased to be a deputy United States marshal and were made in the name of a marshal who had likewise gone out of office. For aught that appears, the incumbent marshal had nothing to do with the amendments, except the physical act of filing the amendment of October 4, 1923 (tr. p 277, 278). Certainly it was no part of his duty to amend a return of his predecessor in office. His bond covered only "the faithful performance of said duties by himself and his deputies" (R. S. Sec. 783; U. S. Comp. Stat. Sec. 1307.) Clearly no recovery could be had on his bond. And it is equally certain that no recovery could be had upon the former marshal's bond, because he participated in no manner in the making of the return. It does not even appear that the permission of himself or his surety was had for the making of

said amendment, or that they knew of it; and the condition of his bond would doubtless be limited to such acts as were performed by him during his term of office.

Point II.

The Court Has no Power to Impose Conditions Upon the Granting of a Motion to Vacate, Where There Has Been no Actual Service.

No Knowledge on Thomason's Part Shown.

Under their contention that the "rule of conclusiveness" should be adopted "in a modified form", counsel for appellant take the position that the decree should not be vacated unless the defendant shows absolutely no knowledge of the litigation, and a meritorious defense, and offers to waive the statute of limitations and to come in and defend. This argument as applied to the instant case rests upon two assumptions which are not warranted. In the first place, it is assumed as an established fact that Jasper Thomason had actual knowledge of the pendency of the litigation. Waving the banner of fraud, counsel would have the court substitute surmise and conjecture for legal proof. It must be remembered that the amended bill charges Thomason merely with having permitted himself to become a conduit for title and shows that he had no financial interest in the transaction; that he was not a party to the original bill; that no apparent effort was made to serve him with subpoena on the supplemental bill; that no personal service was made upon him and that his family know nothing of his ever hav-

ing actually received the copy of the subpoena which was left with Rosamond (Tr. p. 258, 308.) At the time he made his affidavit, the question of actual knowledge as distinguished from service had not been raised and his affidavit did not anticipate the defense. By the time that the point had been advanced, his health and mentality were so seriously impaired that at times he was not rational. He was suffering from a severe nervous breakdown (Tr. p. 257) and was actually confined in a sanitarium (Tr. p. 309); hence it was impossible to show directly that he had not received the copy or did not actually know of the pendency of the litigation. All that plaintiff can produce as a basis for its charge of knowledge is the family relationship, the unfounded claim of evasion of process and the general cry of fraud and conspiracy.

Actual Knowledge Is Legally Inconsequential.

Be that as it may, the question of knowledge of the litigation or actual receipt from a third person of the process is legally a false quantity. This proposition rests upon the basic principle that due process of law requires that a defendant be summoned into court in the manner prescribed by law and that there is no substitute therefor except his voluntary appearance.

That knowledge cannot take the place of legal notice is established by the following authorities:

32 Cyc. page 462, says:

> "If all that the statute requires is done, it is immaterial that defendant in fact receives no actual notice thereof; and conversely, if the statute

> is not complied with it is of no avail that defendant does in fact receive actual notice of the action."

National Metal Co. v. Greene Con. etc. Co. 11 Ariz. at page 110: The National Metal Company, appellant, brought suit against the Greene Consolidated Copper Company and another. A demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment thereon was rendered for the defendants. From this judgment plaintiffs appealed.

> "The complaint, in the briefest substance, alleges that plaintiff is a foreign corporation not at any time engaged in the transaction of business in this territory except in isolated transactions in the nature of interstate commerce; that in March, 1903, the defendants sued the plaintiff in the district court of Santa Cruz County; that in that suit the sheriff made return of summons certifying that he had served the same upon one Pellegrin, the agent of the plaintiff (defendant in that suit); that plaintiff did not appear in that action or answer therein; that on June 23, 1903, being the last day of the term of that court, the court rendered personal judgment by default against the plaintiff; that the said Pellegrin was not at the time of such alleged service, and never had been, the agent of the plaintiff in any manner or for any purpose whatsoever; that on April 4, 1903, *an officer of the plaintiff received a letter, at the New York office of plaintiff, from A. L. Pellegrin & Co., stating that service of summons had been made upon them in the action referred to,* and that they had notified both of the plaintiffs in that

action and their attorneys that they were not, and never had been, the agents of plaintiff; that plaintiff did not receive either from Pellegrin & Co., or from any other source a copy of the summons; that at the time of said service the said Pellegrin gave notice to the sheriff serving him and to the plaintiffs in that action that he was not, and never had been the agent of the plaintiff for any purpose whatsoever; that after receiving notice of the rendition of the said judgment, plaintiff in November, 1903, filed in said action its motion to quash said pretended service of process and to vacate, annul and set aside said default judgment, which motion was denied. * * *

1. It seems manifest from the statements and argument of counsel that the trial court sustained the general demurrer to this complaint upon the authority of the decision of the Circuit Court of Appeals for the Seventh Circuit of Massachusetts, Benefit Life Assn. v. Lohmiller, 74 Fed. 23, 20 C. C. A. 274. The most pertinent expression in this case is: 'If it be conceded that the complainant was not properly served, and that the judgment was voidable, or even void, that condition is not of itself sufficient to warrant interference; but an equity must be presented aside from that bare circumstance, showing that the injured party was without knowledge, was taken by surprise and had no opportunity, in fact, to obtain a hearing. So far as it appears from the allegation of this bill, the complainant may have possessed full and timely information of all the proceedings, but refrained from making any motion, relying upon the assumed defect, and if such were the fact the remedies are legal only. Neglect

of the opportunity which was then open for a hearing would bar equitable relief.' But this expression must not be taken as a statement of a general rule, applicable in all situations. It must be understood in the light of the facts. In that case the association was engaged in business in the state and actual service had been made upon resident agents of the association, professedly under a general statute authorizing such service. The fact of agency was not disputed, but that a different agent should have been served was contended. It was not averred that the agents served, either collusively with the plaintiff in the action in which process was served, or at all, had failed to acquaint the proper officers with the service; but it was urged that service should have have been made under a special statute, upon a special agent for service of process, and not under a general statute authorizing service upon any agent. Applied to those facts, the statements quoted have a very different bearing from that had if they are applied to the facts in this case; we cannot accept them as applicable to these facts. Here the plaintiff was advised by a stranger that the stranger had been served with process in a case against plaintiff. The credit it may have given to this information is immaterial. *If it relied upon the information and believed that a suit had been instituted against it, it nevertheless could appropriately ignore the matter, and assume that the court would not proceed to judgment until service should be made. A distinction is to be observed between knowledge of the pendency of a suit and notice thereof.* Jurisdiction can be acquired, if one does not sub-

mit himself to it, in no other way than by actual notice or by constructive notice. Actual notice is given only by personal service of process; constructive notice, by some form of substituted service. Some decisions which superficially may appear to oppose our conclusion may be reconciled with it by observing that it is often held, and properly so, that actual notice may sometimes be given, although there is a formal defect in the manner of service; in considering the matter the word 'knowledge' is occasionally used inaccurately for 'notice' and vice versa. In such case there has been service despite the informality. The time to attack such service by reason of such informality is prior to judgment. A failure so to attack the service may amount to a waiver of the informality; and one who has ignored such service, and thereby has lost an opportunity to be heard in the case may have no just cause for complaint after judgment. *But where there is no service these is no notice, irrespective of any knowledge which the defendant may acquire informally. Notice is given only by service of process. Informal knowledge will not supply it, and cannot be relied upon to put the one acquiring the knowledge upon notice or to force him into court to defend himself.* The supreme court of the United States recognized this in Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 612, 19 Sup. Ct. 308, 43 L. Ed. 569. After reference to certain notices provided to the company, it is said: 'We do not intimate that mere knowledge or notice as thus provided would be sufficient without a service on the agent in the state where the suit was commenced.' Again: 'Process sent (to a nonresi-

dent) out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.' Pennoyer v. Neff, 95 U S. 727, 24 L. Ed. 565 Still further: 'No court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court or voluntarily appears.' Mexican Cent. R. Co. v. Pinkney, 149 U. S. 209, 13 Sup. Ct. 865, 37 L. Ed. 699. 'It is not sufficient', says Alderson on Judicial Writs and Process, pages 227, 228, Sec. 111, 'that a defendant have actual notice (knowledge) of a proceeding against him; he must be summoned in a lawful manner.' The point we are making is clearly pointed out again by the supreme court of the United States in Fitzgerald etc. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 39, 34 L. Ed. 608, as follows: 'So that, whether the president of this company was inveigled into Lancaster county or not, the service upon him amounted to no more than an informal notice only, and did not bring the company into court, and this the company was bound to know, and must be held to have known. Without regard to the evidence relied on to show that there was concealment of the circumstances in relation to the service, knowledge of these circumstances was wholly immaterial, in view of the fact that the service was unavailing to bring the defendant into court, unless it chose to come there.' * * * The distinction between actual service, though defective, and entire absence of service is interestingly illustrated in the decisions in the case of Capwell v. Sipe (C. C.), 51 Fed. 667, affirmed 59 Fed. 970, 8 C. C. A. 419. See, also, Hollings-

> worth v. Barbour, 4 Pet., at p. 476, 7 L. Ed. 922. If the allegations of the complaint in this case are true, there was no service whatsoever, and the judgment, though not void on its face, is void in fact; and plaintiffs' only adequate protection lies in this action. *That it did not act upon the information acquired from Pellegrin was not neglect, was not 'sleeping on its rights'; it was inaction in reliance upon its legal rights, in reliance upon the constitutional guaranty of due process of law. Such is not the inaction which bars relief in equity.* To accomplish such a bar, it is said that the inaction must be such as amounts to a 'violation of positive legal duty'. Pomeroy's Equity Jurisprudence, 2d ed., Sec. 856, 1187."

Wilmer v. Pica, 118 Md. at 550: Speaking of a case of service upon defendant's daughter, the court said:

> "It does not matter that she may have been informed by her daughter of the nature of the proceeding."

Caldwell v. Glenn, 6 Rob. (La.) 9: The citation in this case had been ineffectually served and the court said:

> "Knowledge of the suit on the part of the defendant, no matter how clearly brought home to him, will not supply the want of citation."

Osborne & Co. v. Columbia etc. Corporation, 38 Pac. 160, 161 (Wash.):

> "Two other reasons are suggested why the order of the lower court should be reversed; One is that the defendant had knowledge of the

> pendency of the suit and that such knowledge should be given the same force as proper service. But we are aware of no rule which compels a defendant to appear in a case until service has been made, requiring such appearance."

Harrell v. Mexican Cattle Co., 73 Texas, at 615: In this case the writ was served on one Swinney as secretary of defendant corporation. He was not elected to the office until three days after service and it was held that the service was void. The court said:

> "The third and fourth propositions submit that the evidence showed that the officers of the appellee corporation had actual notice of the issue of the writ of garnishment or at least knowledge of such facts as should affect them with constructive notice. We are of the opinion that these propositions are based upon a misapprehension of the law of the case. In ordinary actions courts acquire jurisdiction over the persons of defendants so as to render binding judgments against them by the service of process in the manner provided by law. Service may be waived by express stipulation in writing or by the voluntary appearance of the party either in person or by attorney. But we know of no authority for holding in any case that actual knowledge of the existence of a suit or the issue of a writ will supply the want of service. A defendant may know that a suit has been brought against him, yet he is not bound to take action until he has been duly served with process. He may justly conclude that the court will see that he has been duly cited before acting, and hence is not presumed to know of a judgment

that has been rendered against him without jurisdiction."

Bradley Mfg. Co. v. Burrhus, 135 Ia. 324. This case arose under a statute providing for service by leaving copy at residence, etc. The copy was left with the defendant's wife, and with respect to the impeachment of the officer's return, the court said:

"It need only be said that, as the statute prescribes the method of bringing a party into the court, it can be done in no other way; and the cases are uniform to the effect that his knowledge otherwise acquired, of the pendency of the proceedings, is matter of no moment. He is not chargeable until he becomes a party, and he can be made a party only by proper service of notice or by voluntary appearance."

Savings Bank v. Authier, 52 Minn. 98: The defendant was E. J. Daly. The writ was served on John E. Daily, *who mailed it to the defendant* with a letter of explanation and *the same was received by the defendant* several days before judgment entered. The court said:

"The facts as to service being as above stated, it is perfectly useless to try to sustain the judgment, or to oppose the order setting it aside. The transmission of the summons by mail was wholly unauthorized by law as a mode of service, and of no more effect, although the defendant received it, than would have been his finding it in the street if it had been lost. The statute not only prescribes that service shall be made by delivering a copy thereof to the defendant personally (spe-

cial provision being, however, made for a different mode of service at the house of his usual abode) but it in terms declares that the provision with reference to the service by mail of notices and other papers in actions shall not apply to the service of a summons.

The judgment being void for want of jurisdiction, the respondent was entitled to have it set aside, even though he made no showing of a meritorious defense."

Wilcke v. Duross, 144 Mich. 243; Syllabus:

"Where, in a suit in Justice's Court, process was by mistake served upon defendant's daughter of the same name, instead of upon defendant, and defendant did not appear, the judgment founded thereon is void, and is properly set aside in chancery, *though defendant knew of the mistaken service on the day it was made and was kept advised by counsel of the progress of the case.*" (Italics ours.)

O'Connell v. Gallagher, 104 N. Y. App. Div. 492; In this case the process server thought that he was serving the defendant Gallagher but he served another person, who let it drop to the floor and a servant of the defendant found it and delivered it to the defendant. The court said:

"The fact that the summons and complaint is found upon the floor of a house, or in the street by a defendant in an action, or is delivered to a defendant in the action by one so finding it, is not the service that the Code of Civil Procedure requires, and defendant is under no obligation

to appear and answer because a copy of the summons in an action in which she is named as a defendant comes incidentally into her possession when there is no delivery of the summons as a service upon her. *Under such circumstances the defendant was justified in waiting until the judgment was sought to be enforced. The question of laches, therefore, cannot be considered, as the defendant had the legal right to have this judgment set aside at any time upon it appearing that it had been entered without actual service of the summons* * * *." (Italics ours.)

Kochman v. O'Neill, 202 Ill. 110: In this case service of summons was made by reading it to the defendant's daughter, the statute apparently permitting of service upon the defendant by reading to him. The daughter told her mother about the incident the same evening of the attempted service but the court held the service void.

Counsel's attempted distinction of these cases by pointing out differences in the facts in no wise impairs the principle there recognized and applied; namely, that knowledge is not notice and that notice is an essential requisite of due process.

We recognize that there are numerous state decisions, such as those cited by appellant, which hold to the contrary; but we shall not endeavor to review them, for the result would be merely a showing that there are two divergent lines of reasoning on the subject and that the state authorities upon which appellant relies are not binding in this court, because they fail

to take into consideration the basic constitutional principle involved in the decision of the point.

The case of Mass. etc. Assn v. Lohmiller, 74 Fed. 23 (C. C. A. 7th Cir.), cited by appellant, uses broad language which must, however, be construed in the light of the question there decided; namely, whether a court of equity would grant relief against a default judgment without a showing on the part of the plaintiff that he had a meritorious defense to the action and had not been guilty of laches. The question was acutally decided upon grounds peculiar to bills in equity. Moreover, as shown by the quotation from the National Metal Company case, *supra*:

> "The association was engaged in business in the state and actual service had been made upon resident agents of the association, professedly under a general statute authorizing such service. The fact of agency was not disputed, but that a different agent should have been served was contended."

The case of Cowden v. Wild Goose etc. Co., 199 Fed. 561, 565, merely held that the defendant in the action was estopped by knowledge and acquiescence to deny the actual authority of one who had appeared in and conducted the action on behalf of the defendant.

Martin v. Gray, 142 U. S. 236, likewise proceeded upon grounds peculiar to an action in equity and relief was denied because of the laches of the complainant, who, after the sale under the foreclosure judgment which he sought to attack, had with knowledge permitted the purchaser to take possession and for eleven

years enjoy the same, there being no excuse given for the delay.

These cases in no wise impinge upon the doctrine which is so aptly stated in the National Metal Company case, *supra,* as follows:

> "Jurisdiction can be acquired, if one does not submit himself to it, in no other way than by acutal notice or by constructive notice. Actual notice is given only by personal service of process; constructive notice, by some form of substituted service. * * * But where there is no service there is no notice, irrespective of any knowledge which the defendant may acquire informally, notice is given only by service of process. Informal knowledge will not supply it, and cannot be relied upon to put the one acquiring the knowledge upon notice or to force him into court to defend himself."

The decisions which purport to work out jurisdiction through the existence of actual knowledge ignore utterly the constitutional principle enunciated in such cases as Mexican Cent. R. Co. v. Pinkney and other cases cited, *supra.*

No Waiver of Statute of Limitations Necessary.

Counsel's contention that a grave wrong is being perpetrated by Judge James' ruling because it will raise the bar of the statute of limitations between the plaintiff and the defendant Thomason is just another cry of "wolf." It is well established that Federal equity courts apply state statutes of limitation only to the

extent that equity is thereby accomplished and not where injustice will be the result.

1 Foster's Federal Practice, Sec. 181, pp. 1050, 1051;

Kirby v. Lake Shore etc. R. R. Co., 120 U S. 130; 30 L. Ed. 569, 572;

Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 206.

An equity action is commenced, so as to toll the statute of limitations, upon the filing of the bill, provided, however, that a subpoena is procured and reasonably diligent effort made to effect service in the manner prescribed by law. Unless such reasonable effort is made, the mere filing of the bill will not interrupt the statute. U. S. v. American Lumber Co., 85 Fed. 827, (9 C. C. A.); U S. v Miller, 164 Fed. 444 (Dist. Ct. Ore.).

If any limitation has intervened between the plaintiff's alleged cause of action and a recovery against defendant Thomason, it has been due to the fatuous reliance of plaintiff ever since October 4, 1923, upon the proposition that the marshal's return, however false or fallacious, could not be disputed (Tr. p. 267). Under such circumstances, plaintiff cannot complain. Particularly is this true when the conduct of Thomason, which counsel would have held inequitable, is on an even par with the conduct which, as we have shown, lies at the very base and inception of this whole equity proceeding.

No offer to Defend Is Necessary.

The rule of "modified conclusiveness" for which appellant contends is nothing more or less than a request for a ruling to the effect that one who would challenge the jurisdiction over the person must, in the same breath, hazard his whole cause upon the decision of the trial judge, and if that decision be against him, enter a general appearance. In other words, a conversion of the special appearance into what is in effect a general appearance.

This court endeavored to accomplish the very thing for which appellant now contends, when it adopted Rule 22 providing that in case of special appearance the notice thereof should state "that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, he will appear generally in the case within the time allowed therefor by law, or by the order of court or by stipulation of the parties. If such statement be not made as above provided, the appearance shall be deemed and treated as a general appearance."

The Supreme Court, in the case of Davidson Bros. Marble Co. v. U. S. ex. rel. Gibson, 213 U. S. 10; 53 L. Ed. 675 held this rule invalid because in excess of the court's power, saying in part:

> "It says to him, you may appear specially and object to the jursidiction, only upon the condition that you will abide by the decision of a single judge; if that is against you, you must waive your objection and enter a general appearance; if you do not agree to do this, your special appearance

will be deemed to be general. *We think it was beyond the power of the circuit court to make and enforce a rule which imposes upon defendants such conditions, and transforms an objection to the jurisdiction into a waiver of the objection itself.* The jurisdiction of the circuit court is fixed by statute. In certain cases a defendant may waive an objection to the jurisdiction over his person. But he cannot be compelled to waive the objection if he chooses seasonably to insist upon it, and any rule of court which seeks to compel a waiver is unauthorized by law and invalid. So it has been held that, under the act which requires the practice in the courts of the United States to conform as near as may be to the practice of the courts of the states in which they are held, state statutes which give a special appearance to challenge the jurisdiction the force and effect of a general appearance must not be followed by the courts of the United States. Southern P. Co. v. Denton, 146 U. S. 202, 36 L. Ed. 943, 13 Sup. Ct. Rep. 44; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699, 13 Sup. Ct. Rep. 859; Galveston H. & S. A. R. Co. v. Gonzales, 151 U. S. 496; 38 L. Ed. 248, 14 Sup. Ct. Rep. 401. The reasoning in these cases is pertinent to the case at bar.

To sum up, the circuit court for the northern district of California had no jurisdiction to entertain this suit against these defendants, who are not inhabitants of that district, but, on the contrary, inhabitants of the state of Illinois. The defendants appeared specially, as they had a right to do,—solely for the purpose of objecting to the jurisdiction. *They were not bound to agree to*

> *submit their objection to the final decision of the judge of the circuit court, and the rule of court which treated the special appearance, without such an agreement, as a general appearance, was invalid."* (Italics ours.)

To same effect, see:

> Bacon v. Federal Reserve Bank, 289 Fed. 513, 515.

If the so-called "modified rule of conclusiveness" be now declared by the decision of this case, the effect will be to say to future litigants, situated as was Thomason: "You may appear specially for the purpose of moving to quash service of summons because the requisites of due process of law have not been complied with, but in order that you may have the benefit of your constitutional guaranties, you must agree in advance to abide by the decision of the trial judge, and if his decision is against you, you must appear generally in the action, you must waive the statute of limitations and must show that you have had no knowledge of the pendency of the action." This, we submit, is directly in the teeth of the Davidson Bros. decision, *supra*: The rule for which counsel contend could not be made a rule of court because of lack of power in the court. Certainly it cannot be made a rule of decision in the face of the reasoning of the Davidson case, or in the face of the reasoning of the other Supreme Court cases which we have cited, to the effect that formal legal notice is essential to the existence of due process of law.

Point III.

The Evidence Is Sufficient to Rebut the Marshal's Return and Affidavit.

Copy of Writ Was Delivered to Rosamond.

So far as the returns filed prior to the making of the motion to quash are concerned, they are conclusively and effectually impeached by the affidavits and birth record showing the minority of Rosamond Thomason. Referring to the amendment presented during the pendency of the motion, it must be remembered that the amendment was, before its filing, shown by the evidence and found by the court to be untrue. At the time of the making of the order for its filing and of its delivery to the clerk, it had already been shorn of any actual or presumptive verity. We think it is a fair inference that Judge James merely permitted the same to be filed as a matter of form, for he expressly found the facts the other way. Certainly, under these circumstances, no *prima facie* case is made by the amendment.

Counsel apparently concede that the amended return and the Walton affidavit are to be read together in determining the question of where the preponderance of the evidence lay. They have, however, overlooked these salient facts: that the return shows on its face that the deputy did not know whom he had served, and that his supporting affidavit clearly demonstrates that the other material statements of the return were made wholly upon hearsay evidence given by an unidentified person. The return states positively that the

person so served was a member of the family of Thomason and a resident in that family, also that said person was an adult. Reference to the affidavit shows that the deputy could not possibly have known any of these facts so certified by him, except upon the strength of the statements alleged to have been made by the person with whom he conversed at Thomason's home. He does not know and does not purport to say who that was, except that he claims that that person told him that she was a married daughter, etc. The documents upon which appellant relies show affirmatively that the return is made upon hearsay, pure and simple.

Opposed to this are the affidavits of Mrs. Thomason and her four daughters. Those affidavits establish, as a matter of personal knowledge of the respective affiants, that at the time of the attempted service Jasper Thomason was in Kern county; that his wife was with him; that they were at the home of their daughter Gladys; that the daughter Verna, who then resided in San Pedro, was not present at the defendant's home on the occasion in question; that Meryle T. Davis, though visiting at said home, was absent at the time and that the deputy conversed with Rosamond and left the papers in her presence. This was the version of the transaction which was adopted by Judge James. And the original return clearly demonstrates that the deputy marshal did not understand that he had delivered the writ to Meryle. Before filing, he struck her name out of the return. (See stipulation for diminution.)

This Court Revises Only Palpable Errors in Findings of Fact.

Counsel seek to have this finding of fact overthrown through an exercise of the power of an equity court to re-examine the facts upon appeal. The existence of power may be granted; but that does not concede the propriety of its exercise in every case. In U. S. v. Marshall, 210 Fed. 595 (8 C. C. A.) the court said:

> "To secure a reversal upon such a basis as that just mentioned the *appellant must convince us not only that the trial court may have been wrong, but that it was manifestly wrong.* There must, under the holdings of this court, have been *an 'obvious error' of law or a 'serious mistake' in dealing with the facts.* (Citing cases.) The error must be 'clear and palpable'. Babcak v. De Mott, 160 Fed. 882, 88 C. C. A. 64. *The conclusion of the trial court is 'presumptively right'.* State of Iowa v. Carr, *supra.* Some distinction relieving from this rule is claimed in the present case because the testimony was not taken before the judge but before an examiner, and it is said that under such circumstances this court is in as favorable a situation to deal with the matter as was the court below. United States v. Booth Kelly Lumber Co., 203 Fed. 423, 121 C. C. A. 533, from the Ninth Circuit, is cited to this point. But the question is not so much one of situation to decide as of where the law places the primary determination of questions of fact. While no doubt the circumstance that the district judge personally heard the witnesses tends to strengthen the presumption in favor of his conclusion—a consideration mentioned by this court in Coder v. McPherson, 152 Fed. 951, 953, 82 C. C.

A. 99, also in Harper v. Taylor, 193 Fed. 944, 113 C. C. A. 572, by the Circuit Court of Appeals for the Sixth Circuit in Mt. Vernon Co. v. Wolf Co., 188 Fed. 164, 110 C. C. A. 200, and by the Circuit Court of Appeals for the Ninth Circuit in The Santa Rita, 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210—*the fact that he did not hear such witnesses, but that the proofs before him were entirely by deposition or upon examiner's report, does not destroy the presumption.* Such still exists in favor of his conclusion. *To hold otherwise would in effect be to make this the court of first instance.* The District Court is not in such matters a mere conduit. It, not this court, is the trial court. *Our functions are simply to guard against manifest error on its part, and this is true whether such arises upon hearing witnesses or upon reading a record.*" (Italics ours.)

In Schlafly v. U. S., 4 F. (2d) 195, 198, the same court said:

"At the outset we are confronted with the well-settled rule that, in a proceeding in equity,—and this must be treated as such—the findings of the chancellor on disputed evidence have not the conclusive effect as the findings of a jury, or of the trial judge when a jury has been waived, in an action at law; but *unless it is clearly against the weight of the evidence,* or based on a mistaken view of the law, it will not be disturbed by an appellate court, especially if the finding has been made by a master, or in a bankruptcy proceeding by the referee, and approved by the court on a petition for review. * * * But it is claimed that this rule does not apply to the instant case, as the hearing before the referee was on deposi-

tions entirely, and he had no better opportunity to determine the credibility of the witnesses than this court has.

Prior to the promulgation of the present equity rules, the evidence in equity cases was entirely on depositions, yet the same rule of law was followed by the Supreme Court and all other national appellate courts.

In Newell v. Norton, 70 U. S. (3 Wall.) 257, 267 (18 L. Ed. 271), which was an admiralty case, in which the entire evidence was on depositions, it was held: 'It is enough to say that we find ample testimony to support the decision, if believed; and that we again repeat, what we have often before decided, that in such case *parties should not appeal to this court with any expectation that we will reverse the decision of the courts below, because counsel can find in the mass of conflicting testimony enough to support the allegations of the appellant.* * * * *Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony.'* And this court has uniformly so held. * * * *The error must be palpable to justify it."* (Italics ours.)

In an effort to destroy the effect of the evidence submitted on behalf of defendant, counsel call attention to certain alleged contradictions in the affidavits of Rosamond. They say that because she stated in her affidavit of April 7 that Walton "delivered to her" a copy of the subpoena, and in her later affidavit of April 26 that he threw the same on the porch in her presence, she

has sworn falsely. The first affidavit was made in support of the original application to vacate. No occasion presented itself for drawing a distinction between physical and legal delivery of a copy. The last affidavit detailed the facts for the purpose of showing the inaccuracy and falsity of the Walton affidavit. No point has been raised at any time to the effect that the service in the manner made by the marshal was not good if he made it upon a person whom he was entitled to serve.

Counsel point to the fact that in her second affidavit Rosamond said that she told the marshal her father would probably be at home soon, and in the third one that she told him her father was at the time in Antelope Valley. We see no conflict here.

Counsel contrast the Meryle T. Davis affidavits with those of Mr. Walton and Mr. Lewinson. Their respective statements relative to the alleged evasion of process have been already considered and the attenuated nature of their swearing disclosed. The only other attack they make on the Meryle Davis affidavit is the claim that she had been found guilty elsewhere (when not brought in as a party) of certain false swearing. Be that as it may, Judge James was as well qualified to pass upon her veracity as was Judge Bledsoe, and the fact that Judge Bledsoe may have found her testimony false in any respect—(whether he did or did not we do not know)—would by no means conclude Judge James or this court.

In view of the above quoted authorities, we submit that there is no basis whatever for the claim that

Judge James' ruling is not amply supported by the evidence.

Oral Hearing Not Proper Procedure.

Counsel complain loudly of the refusal of the court to order an oral hearing upon the motion so that they (counsel) might exhibit their skill in cross-examination. In the first place, the practice which they claim should have been followed is out of line with the established procedure. The well nigh uniform practice is to present and dispose of such motions upon affidavits only.

Mechanical Appliance Company v. Castleman, 215 U. S. 437; 54 L. Ed. 272;

Higham v. Iowa etc. Association, 183 Fed. at 847;

Peper Automobile Co. v. American Motor Sales Co., 18 Fed. 245;

American Cereal Co. v. Ely Pettijohn Cereal Co., 70 Fed. 398;

Wall v. C. & O. Ry. Co., 95 Fed. 398;

Benton v. McIntosh, 96 Fed. 132.

Counsel assert that the adherence to the settled practice in this case was in effect a concession to the fears of the Thomason family. They insinuate that Thomason was not in the physical condition which would prevent his examination or making of affidavits. The showing of Drs. Mortensen and Brainerd, wholly disinterested witnesses, corroborates fully the affidavits of the members of Thomason's family to the effect that his condition absolutely forbade any further participa-

tion in the proceding. There is nothing whatever in the record to show any reluctance on the part of any of the witnesses to submit to cross-examination. This is merely a figment of counsel's imagination. Thomason's solicitors were conducting the proceeding,—not his relatives. They were neither asked to testify orally, nor did they object thereto.

Thomason's solicitors merely directed the court's attention to the fact that plaintiff's requests for oral examination were directed toward a false issue in the case; namely, defendant's actual knowledge of the suit or his actual receipt of a copy of the subpoena [see Tr. pp. 243, 250, 251, 315, 212]. The authorities above cited clearly show that knowledge or lack of knowledge is of no consequence in the absence of notice given in the method prescribed by law.

Service on Married Daughter Not Compliance With Rule 13.

If counsel had been permitted a cross-examination of the witnesses and had succeeded in developing the facts which he now claims; *i. e.*, that the service was made by delivering a copy to a married daughter, he would be hoist on his own petard; such a showing would prove a service other than that authorized by equity rule 13, because it would show that the person served was not a member of the family of defendant Thomason.

Mrs. Thomason, Rosamond and Mrs. Harris affirmatively state that the only persons residing in the home of Thomason on the date in question were the

defendant, his wife and his daughter Rosamond [Tr. pp. 298, 305, 308]. It was likewise conclusively established that all of the daughters except Rosamond were at the time married and had ceased to become a part of their father's household. One lived in Antelope Valley and one in San Pedro. The residence of Meryle T. Davis is not definitely fixed, but it does affirmatively appear that she was not residing in her father's home [Tr. pp. 302, 261].

The equity rule provides that substituted service may be made by leaving a copy with an adult person "who is a member of or resident in the family". It is clear, as a matter of law, that these married daughters who constituted a part of the family of their respective husbands, had, for the purposes of the rule, ceased to be members of the family of defendant Thomason. That word, as used in statutes providing for substituted service, does not apply to married daughters who are living in their own separate homes.

In Heineman v. Pier, 85 N. W. 646 (Wis.), the statute authorized service "by leaving a copy thereof at his usual place of abode in the presence of someone of the family of suitable age and discretion". The return showed service "at her home, No. 577 Van Buren street, in the city of Milwaukee, which is her usual place of abode, by delivering to and leaving with her daughter, Mrs. Jno. H. Roemer, a member of the family of said defendant, who resides with her, being a person of suitable age and discretion, a true and correct copy thereof". A motion to quash service was denied by the lower court and a motion to vacate the

judgment was likewise denied. In reversing the case, the Supreme Court said:

> "It seems very plain that there was no legal service of the summons in this case, and that the pretended service should have been set aside. * * * Statutes dispensing with actual personal service of process must be strictly pursued. Pollard v. Wegener, 13 Wis. 569. It is imperative that the summons be delivered to a member of the family to which defendant belongs. In this case it was delivered to defendant's married daughter, who resided, with her husband, in the same house or building with defendant, but in separate apartments; the two households being managed separately, each paying their own expenses and employing their own separate servants. Families may be separate though living under the same roof. * * * In order to constitute a family, the persons composing it must be under one management or head. Poor v. Insurance Company (C. C.), 2 Fed. 432 * * *. The defect being jurisdictional, she was not required to show merits."

In Colter v. Luke, 108 S. W. 608 (Mo. App.), the court was construing a statute providing for service by leaving a copy "with some person of his family". The decision says:

> "The word 'family' as used in the statute may be defined as 'a collective body of persons who live in one house, under one head or manager, including parents, children and servants, and, as the case may be, lodgers or boarders'. * * * In speaking of the persons of a family, the words

'person' and 'member' are synonomous, and may be used interchangeably."

In Poor v. Hudson Co., 2 Fed. 432, 438, the court said:

> "The most comprehensive definition of a family is 'a number of persons who live in one house and under one management or head'. There is no specific number required to constitute a family; but they must live together in one house and under one head. * * * The precise question is, were they living there together, under one head or management? This is one of fact and not of law."

25 Cor. Juris. 664:

> "* * * unless the context manifests a different intention, the word 'family' is usually construed in its primary sense. * * * In its ordinary and primary sense, the term signifies the collective body of persons living in one house, or under one head or manager; a collective body of persons, consisting of parents or children, or other relatives, domestics, or servants, residing together in one house or upon the same premises; a collective body of persons living together in one house or within the curtilage; a collective body of persons who form one household under one head and one domestic government; those who live under the same roof with the pater familias, who forms his fireside. * * *"

See, also:

Jackson v. Smith, 200 Pac. 542 (Okla.).

It seems clearly apparent that if the court had concluded that service had been made on Meryle T. Davis

or any of the married daughters of Thomason, it would likewise have granted the motion to quash for lack of compliance with equity rule 13, in that there had been no delivery of copy to a member of the family of the defendant.

Point IV.

Rosamond Thomason Was Not An Adult Person Within the Purview of Equity Rule 13.

"Adult Person" Means One of Full Legal Age.

1 Street's Fed. Eq. Prac., Sec. 595, page 371, commenting upon the decision in the Von Roy case, *supra,* says:

> "The fact was not observed upon that the return also failed to show that the copy was left with an adult, though this was doubtless a fatal defect. In our law, a person is not an adult in either legal or common acceptance until he is of full legal age. In the civil law a male is adult at fourteen."

Bouvier's Law Dictionary says:

> "Adult. * * * In Common Law. One of the full age of twenty-one."

In Banco de Sonora v. Bankers' Mut. Cas. Co., 100 N. W. 532, 535 (Iowa), the court was construing the phrase "two adults" as used in an insurance policy requiring the packing of certain articles by two adults before delivering to the carrier. The court quoted Blackstone as follows:

> "So that full age in male or female is 21 years, which age is completed on the day preceding the anniversary of a person's birth, who till that time

is an infant, and so styled in law," and then said: "Thereafter they are adults. And this is the conclusion of the lexicographers and the courts generally concerning the term in its legal acceptation."

In Schenault v. State, 10 Tex. App. 410, 411, the court said:

> "The word 'adult' seems to have a well defined meaning both in law and in common acceptation. Mr. Bouvier defines the meaning of the word as used in the civil law, with which we have no present concern, and says: 'In the common law, an adult is considered one of full age.' Mr. Wharton defines the word as signifying 'a person of full age.' Mr. Webster gives as one of the meanings: 'One who has reached the years of manhood.' In Raven v. Waite, 1 Swanston's, Ch. L. 533, 36 Reprint 502, cited by Mr. Bouvier, the term 'adult' and the phrase 'having arrived at the age of twenty-one years' appear to be used interchangeably."

See, also:

1 Cor. Juris. page 1403.

Opposed to this array of authorities is counsel's *ipse dixit* that "adult" has a different meaning when used as an adjective from its commonly accepted meaning when used as a noun. The definitions in Webster's Dictionary, to which reference is made, support no such conclusion. Nor is there any reason for assuming that the Supreme Court used the phrase "adult person" in any other than its ordinary acceptance. It must be remembered that the rule was not addressed to a school of sophists, but was designed for the prac-

tical use of members of the bar and officers of the court; that it was therefore intended to be accepted with the meaning commonly understood in the legal profession—a person of full age. Of course one is not of full age under the common law rule until having arrived at twenty-one years, or, under the California Code rule, in the case of a woman, until having attained the age of eighteen years (Cal. C. C., Secs. 25, 26 and 27).

The reason for the Supreme Court's use of the word "adult" as an adjective is readily apparent. As the rule stood prior to its revision of 1866, it was provided that a copy could be left "with some free white person, who is a member or resident in the family" (17 Peters, lxiii). By the amendment of 1866, the word "adult" was substituted for the words "free white" and, in other respects, the language of the rule which we have just quoted remained the same.

The degree of counsel's conviction as to the merits of this argument is discolsed by their discussion of the conflict between the affidavits of Rosamond Thomason Hunt and Mr. Walton. Walton's return in every instance says that the copy was left with an adult person. Rosamond's affidavit states that she told Walton that she was but seventeen years of age. Hence, say counsel: "Rosamond accuses the marshal * * * of making with knowledge a deliberate *false return.*" (Appellant's Brief, page 16.) The marshal's returning service upon an *adult person* in the light of information to the effect that she was but seventeen years of

age is also characterized as a false return at pages 26 and 86 of the brief.

Counsel's argument as to the meaning of "adult person" is predicated largely upon the assumption that the rule was intended as a convenience to the marshal rather than as a means of insuring actual delivery of the process to the person for whom it is intended. They say that it is easier for the marshal to ascertain physical and mental development than it is age or nonage, and that therefore the rule should be construed so as to permit a marshal to determine for himself whether the person to whom process is handed is sufficiently mature to come within the term "adult", and, having so determined, to make a written return which states the fact of service upon an adult person and forever precludes a defendant from disputing the return. Of course the obvious purpose of the rule, as in the case of all statutes or rules providing for constructive or substituted service, is to provide some reasonable method of service which will, as a practical means, accomplish the delivery of the notice to the defendant. It is for the law making power (in this instance, acting through the Supreme Court in formulating rules), to determine what is the reasonable method of giving such notice and to prescribe such notice as, in its judgment, reasonably constitutes adequate and certain notice. Within constitutional limits, that discretion is uncontrolled. But when the law making power has once acted in the premises and has prescribed the form or manner of service of process, that form and that manner must be scrupulously observed, or the service

goes for naught. It will not do in such instances to say that some other method has been pursued which gives just as full and just as certain notice. If the statutory method has not been followed, the service is utterly void. (Settlemier v. Sullivan, *supra;* Harris v. Hardemann, *et al., supra;* King v. Davis, *supra;* Mexican Cent. R. Co. v. Pinkney, *supra.*)

Through Equity Rule 13, the Supreme Court has in substance said that the person to whom process is delivered must be of full age, and it will not do to say that she looked or talked like she was of full age. It is necessary that she be of full age; otherwise there is no service.

No Showing That Rosamond Was an Adult Within Appellant's Definition.

Even if counsel's contention as to the correct construction of the phrase "adult person" were to be adopted, the record before the court would not warrant a holding of service upon an adult person. This, for the reason that there are no presumptions in favor of the return (Harris v. Hardemann, *supra;* Blythe v. Hinckley, *supra*), and it is incumbent upon the officer to affirmatively show in his return compliance with all of the requisites of the rule. For instance, in King v. Davis, *supra,* the return was held bad because it did not state that the wife was a member of the defendant's family; in Blythe v. Hinckley, *supra,* it was intimated that the return was had because it did not state that the person to whom delivery was made was a member of defendant's family, and in Harris v. Harde-

mann, *supra,* because it did not state that the defendant could not be located. In other words, the burden is upon the plaintiff in this case to show that in fact Rosamond Thomason was an adult person within the meaning of that term as defined by its counsel. It appears without contradiction that she was but seventeen years and five months of age. Therefore, in order for plaintiff to succeed, under its own definition, it must show affirmatively that mentally and physically Rosamond had attained that degree of perfection which counsel denominate as maturity. Their affidavits are absolutely silent on the subject and they must, in any event, fail in their argument that service was made upon an adult person.

Point V.

Defendant's Opposition to the Motion to Amend Return of Service Did Not Work a General Appearance.

Appellant's Argument Denies Any Substantial Efficacy to Special Appearance.

The argument of appellant really comes down to the proposition that defendant, in opposing the motion to amend the return, entered a general appearance by inadvertence. The claim is that by taking such steps as were necessary to frustrate plaintiff's effort to defeat the motion to quash, the defendant waived his special appearance, and hence his motion, and *nolens volens* submitted himself completely to the jurisdiction of the court. This contention is made notwithstanding the fact that it is plain on the face of the record that

the brief and affidavits, submitted by Thomason in opposition to the motion to amend, were largely instrumental in procuring the ultimate denial of the motion because they convinced the trial court of the falsity of the facts upon which the proposed amendment was predicated, and of the sham nature of the amendment itself, and caused the court to make a ruling which permitted only the *pro forma* filing of the amendment at the same moment that he found the same to be untrue. Counsel's position is that, though silence on Thomason's part would have resulted in a return showing service upon an entirely different person than the one mentioned in the Thomason motion and affidavits and although that return would have been based upon an undisputed affidavit of Walton, nevertheless Thomason could not disclose the sham nature of the proceeding without irrevocably waiving the point that the court had no jurisdiction over him; in other words, that in order to preserve his special appearance, he must stand by and watch a falsification of the record and a denial of his motion without raising a word of protest. According to counsel's contention, there was no remedy at all for Thomason under the circumstances. If he moved, his motion had to be denied; if he sat silent, a record would be made against him which would necessitate the denial of his motion. In other words, according to counsel's contention, if an erstwhile deputy has a sufficiently elastic conscience, he can create jurisdiction where none existed and can do so with impunity, for no one dares question the accuracy of his affidavits or dares swear

to any other facts. Such a rule is exceedingly illogical and unjust.

Certainly the logical rule would be one which permits the defendant appearing specially to do anything and everything which may be necessary to make his special appearance and motion good. Otherwise, a special appearance is of no value whatever and one must always concede jurisdiction of the person in order to attack want of jurisdiction.

The Facts Pertaining to Alleged General Appearance.

The affidavit of Jasper Thomason [Tr. p. 154], attached to his motion to quash service of subpoena, specifically limited the authority of his solicitors to "the sole purpose of moving this court to quash service of subpoena herein and vacate and set aside the order *pro confesso* made herein on October 12, 1923, and to vacate and set aside as to this defendant the "Final Decree" entered herein on the 24th day of March, 1925, upon the ground that the said court has not and at no time has had jurisdiction over the person of this affiant."

The praecipe for entry of special appearance [Tr. p. 233], filed with the clerk on April 15th, is limited in substantially the same language, and concludes as follows:

"The said defendant does not appear generally in the said cause, but makes a special appearance only for the purpose of contesting the jurisdiction of the court over his person."

After that motion had been argued and submitted to the court, the plaintiff, being apparently persuaded of the right of Thomason to impeach the marshal's return, served upon Thomason's solicitors so appearing specially a copy of his application to amend marshal's return and accompanying papers [Tr. pp. 270, 272, 274]. It is true that the application was not made upon notice, but obviously the service was made upon solicitors for Thomason upon the theory that the amendment was but a step in the consideration or determination of the motion to quash service.

The memorandum and affidavits filed on behalf of Thomason in opposition to the motion to amend were filed upon the theory that the proposed amendment was offered in opposition to Thomason's motion and as a means of defeating the same. The memorandum [Tr. p. 279] upon which counsel lay so much stress shows clearly that such was the idea of counsel for Thomason [pages 280, 281, 291, 292]. It concludes as follows:

"But if the court should not agree with us on this we then respectfully submit that upon a consideration of all of the affidavits and other papers on file which are pertinent to this motion the court cannot fairly arrive at any other conclusion than the ultimate fact that the attempted service was made with respect to Rosamond Thomason and that she was a minor at the said time and the service, therefore, void."

The reply brief of plaintiff [Tr. p. 314] shows that counsel for plaintiff at that time had the same understanding, for point 1 thereof is this:

"That the affidavit of the marshal sufficiently supports the service without the necessity of further order of court and *necessitates denying said defendant's motion heretofore made to set aside the return.*" (Italics ours.)

Point 3 is:

"Assuming the positions taken by us in opposition to said defendant's motion to quash are unsound (which we deny), the question resolves itself into a conflict between the affidavits of the marshal and the daughters of Jasper Thomason."

In their brief in this court, counsel for appellant virtually concede that in substance the memorandum in question was in furtherance of the motion to vacate; but they insist upon the *form* of the matter as being conclusive in the premises. At page 99 they say:

"In the court below defendant heavily emphasized the point that plaintiff's motion to amend the return was occasioned by defendant's motion to quash, and that the two were argued together; at least somewhat. A fair reading of the record leaves no doubt that this is true, but what of it?"

The court itself understood the nature of the position taken by Thomason's solicitors in the same manner as they, for in the court's opinion and order made May 25, 1925 [Tr. p. 320], it ruled upon the application for leave to amend as a part of the ruling upon the motion to quash; and, after permitting the filing of the supplemental affidavit of the deputy marshal, the court said: "Considering the application then, with all of the matters mentioned present," etc., thus

clearly showing that the court considered the supplemental affidavit of the marshal as but an additional showing in opposition to the Thomason motion to quash.

Upon that state of the record does the objection of Thomason's solicitors to the amendment of the return constitute as a matter of law a waiver of the special appearance upon which they at all times insisted? Every document filed by them in the matter insisted upon the special nature of the appearance.

The very memorandum which appellant urges to have worked a general appearance was signed "Wm. T. Kendrick. Newlin & Ashburn. Solicitors for defendant Jasper Thomason appearing specially herein" [Tr. p. 296]. The affidavits submitted therewith were endorsed with the names of the attorneys as "Solicitors for defendant Jasper Thomason, appearing specially" [Tr. p. 314].

When served with the application for leave to amend the return counsel were placed in this position: Their motion was directed to the service as shown by the returns already on file. A new return, shifting the proof of service to some person other than Rosamond Thomason, would in effect offset all of the proofs which Thomason had theretofore offered in support of his motion to quash. If counsel stood silent they would in effect have consented to the denial of their motion because of the new showing made of service upon some other person. Inasmuch as the proceeding to amend was clearly directed at the defeat of the pending motion, it would seem both illogical and unjust to make

any ruling which would in effect hold as counsel for plaintiff now claim,—that, by resisting this new move of plaintiff, defendant Thomason would waive his own motion, at which plaintiff's new move was directed. In other words, plaintiff would now have the court hold that Thomason could not resist plaintiff's counter-motion, except upon the penalty of waiving his own motion and subjecting himself wholly to the jurisdiction of the court, with the result that a judgment rendered in his absence and without jurisdiction over him should thereby be converted into a valid judgment in opposition to which he could no longer be heard,—and all this because of his insistence that plaintiff could not shift its ground in order to defeat his, Thomason's, pending motion to quash service. Unless there is some controlling authority, we apprehend that the court will not visit any such harsh result upon the bona fide efforts of Thomason to preserve his rights in his pending motion.

Appellant's Authorities Opposed to Federal Rule.

Counsel for plaintiff cite one case (Stubbs v. McGillis, 44 Colo. 138), decided in the state court of Colorado, which appears to be in point; but it is, as we shall show, directly opposed to the great current of Federal authority. The other case upon which plaintiff relies and which is somewhat in point is a Wisconsin case (Bester v. Inter-County Fair, 135 Wis. 339), in which the party who was moving to quash service himself moved the court to amend the return of the officer. The last mentioned case presents one

of those situations where the defendant voluntarily became an actor in the cause and affirmatively sought relief from the court. The court in effect held that such application was inconsistent with the insistence upon a want of jurisdiction over the person. It is extremely doubtful whether the Federal decisions sustain the ruling of the Wisconsin court, for the motion was apparently made in an effort to further and effectuate the plea to the jurisdiction. And the rule in the Federal courts, as developed by the decisions in latter years, is that the question of waiver of special appearance is a question of intent, express or implied, and that unless the act which is invoked as a waiver of the special appearance be of a clear and convincing nature no such waiver will be spelled out by inference.

Federal Rule Is That Waiver of Special Appearance Is Matter of Intent.

The case of Southern Pacific Company v. Arlington Heights Fruit Company, 191 Fed. 101 (C. C. A., 9th Cir.), is clearly in line with this position and at variance with many earlier Federal decisions, upon which plaintiff relies, and with many state decisions, which counsel likewise cite. In this case the defendants filed an appearance which raised, first, the point of jurisdiction over the person, second, a challenge to the power of the court to determine the reasonableness of a railroad rate in advance of a determination of the question by the Interstate Commerce Commission, and, third, an absence of indispensable parties. The court said that the defendants had "in reality combined a

plea to the jurisdiction of the court over the person with a plea to the jurisdiction of the court as a court of equity to determine the cause which is presented by the complainants." It is obvious from other remarks of the court that it considered this "plea to the jurisdiction of the court as a court of equity" as being merely a plea to the subject matter of the action, as it really was. In other words, the point raised was not that the court had no jurisdiction over the subject matter but it was that under the circumstances disclosed by the bill the court as a court of equity, in the exercise of its jurisdiction, should not grant the relief prayed for. At page 110 the court said:

> "Unless it be, therefore, that, by combining a ground of want of jurisdiction over the person *with the objection that the complainants are without equity as shown by their bill,* the defendants have submitted themselves to the territorial jurisdiction of the court, they ought not to be further proceeded against. The case at bar upon principle does not differ materially from the Gibson case. There the motion to quash the summons and to dismiss the action combined the two grounds as distinctly as here, and the demurrers were based upon like grounds, which were also acted upon and overruled by the court, yet it was determined there was no waiver as respects jurisdiction over the person. It would seem to be deducible, therefore, from these authorities from the Supreme Court, including the Gibson case, that when the defendant appears specially for the express purpose of challenging the jurisdiction of the court over the person for want of proper service, or upon the

grounds that the venue is not laid in its judicial district, *although he may have combined in his motion or plea to the jurisdiction matter going to the subject of the suit or action, he does not thereby waive jurisdiction over his person.* The purpose of the defendant is to be gathered rather from the nature of his appearance. If, being special, it is to insist unquestionably upon want of jurisdiction of the court, there would be no waiver. By appearing generally the party submits himself to the jurisdiction of the court for all purposes of which the court can take cognizance. The manner of the appearance would be taken as an indication of the purpose of the pleader to submit to the court's jurisdiction, notwithstanding an objection to the contrary. But, where the appearance is declared in unmistakable language to be special, the pleader's intendment that it is not so is not always to be deduced from the fact of the combination of an objection to the jurisdiction *with an objection to the subject-matter.* Of course, the court cannot pass judgment upon the subject-matter without at the same time having jurisdiction of the person, yet if the defendant insists upon his objection to the jurisdiction over his person, and he is in a position to insist thereon, the court ought to give him the benefit of that objection and pass judgment respecting it." (Italics ours.)

Kelley v. T. L. Smith Co., 196 Fed. 466 (7 C. C. A.), says:

"Appellees T. L. Smith Company and Buckley contend that the alleged error was waived through appellants' having made a general appearance by their demurrer. But when appellants added to

their challenge of the court's jurisdiction over their persons a further challenge of the court's jurisdiction over the subject-matter, we do not think that they thereby converted their special into a general appearance, abandoned their objections to the service of subpoena and notice, and asked the court to assume jurisdiction and determine the sufficiency of the bill. Clearly the intent was to urge only objections to jurisdiction."

Counsel for plaintiff seek to distinguish the Southern Pacific and Kelley cases upon the theory that in each instance the plea was confined to a challenge to the jurisdiction of the court, the defendant joining a plea to the jurisdiction over the subject-matter with a plea to the jurisdiction over the person. We submit that the discussion of the decisions, particularly the Southern Pacific case, does not warrant this conclusion. This is particularly apparent from the fact that the Southern Pacific decision discusses and distinguishes the cases of Fitzgerald etc. Co. v. Fitzgerald, 137 U. S. 98, and Mahr v. Union Pacific R. Co., 140 Fed. 921, both of which clearly enunciate the rule that a plea to the jurisdiction of the court over the subject-matter constitutes a general appearance. 4 C. J. 1333, says:

"Broadly stated, any action on the part of a defendant, except to object to the *jurisdiction over his person* which recognizes the case as in court, will constitute a general appearance. Thus a party makes a general appearance by objecting to the jurisdiction of the court over the subject-matter of the action, whether the objection is made by a motion or by formal pleading."

2 R. C. L., page 322, says:

> "A special appearance is one made merely for the purpose of testing the sufficiency of the summons to bring the defendant within the jurisdiction of the court."

The court, in the Southern Pacific Company case, quoted with approval the following language from Harkness v. Hyde, 98 U. S. 476:

> "It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

It appears fairly clear, therefore, that the Southern Pacific case is not to be distinguished upon the ground that the pleas were all directed to the jurisdiction of the court,—primarily, for the reason that the discussion of the case does not warrant this conclusion, and, secondarily, for the reason that the law is well established that a plea to the jurisdiction over the subject-matter constitutes a general appearance. The case holds essentially that joining with a special appearance a plea going to the merits of the case, does not of itself require a holding that the special appearance has been waived and that the result can be reached only when there is something additional and apparent upon the record which is inconsistent with a continued insistence upon the special nature of the appearance.

Sterling Tire Corporation v. Sullivan, 279 Fed. 336, decided by this court and cited by appellant, is not opposed to our contentions. In connection with a pending motion to discharge a receiver, counsel appeared

and, stating to the court that he had authority to represent the Sterling Tire Corporation, he read in open court a telegram authorizing him to act as such attorney and protect the company's interests, and then insisted on behalf of the corporation that the receiver should give a larger bond, and the court ordered that this be done. With respect to the matter of special appearance, this court, after calling attention to the above mentioned facts, said:

> "Counsel did not then ask for entry limiting his appearance, and having obtained what he asked for in the way of an indemnity to his client, is not now in a position to contend that he made a special appearance."

The court also said:

> "Nor do we believe that, when associate counsel for the New Jersey corporation appeared in the later proceeding, the motion of the receiver for instruction and for compensation, counsel's statement that he appeared 'specially' can be held to have been a special appearance. Like the action that had been taken previously by first counsel who appeared, the second appearance was in no way limited to objection to the jurisdiction."

Dahlgren v. Pierce, 263 Fed. 841 (C. C. A., 6th Cir.): In this case the court was discussing the effect of an argument on the merits of the bill, made in connection with a motion to quash, and said:

> "The question of general appearance is one of intent, actual or implied, and *where the whole purpose of defendant's application to the court is to*

set aside an order because it has been made without personal jurisdiction over him, the conduct which will make the motion unavailing and destroy its basis must be clear and unequivocal. It is a matter of everyday experience that, upon the argument of a challenge to the personal jurisdiction, questions upon the merits will collaterally arise. Not uncommonly the court thinks it may not be necessary to decide a difficult question of personal jurisdiction, because there is no good case presented upon the merits, and the court will make the suggestion and desire to hear counsel upon it. Whether argument of this kind comes in response to the court's suggestion, *or comes voluntarily from defendant's counsel by way of good measure in giving reasons why the actual motion should be granted, we think such argument should not be held, of itself and necessarily, a waiver of the objection* which is being so carefully preserved; and, unless there is a rule of law imperatively declaring such a waiver, it ought not to be found from the circumstances of this case." (Italics ours.)

In the later case of Grable v. Killits, 282 Fed. 185, the same court was considering, among other things, the effect of the applicant's applying for and obtaining leave to amend his motion to quash. After quoting from the Dahlgren case to the effect that the question of general appearance is one of intent and that conduct relied upon to work a waiver of a special appearance must be clear and unequivocal, the court said with respect to the point of amending the motion:

"Nor are we able to see that the obtaining (on the hearing of the motion to set aside service) of leave to amend the motion by inserting the name of a defendant not originally included in the notice worked a general appearance. *Such action was directly germane to the motion to set aside service.* Neither this motion, nor the motions to set aside service of the restraining and receivership orders, invoked the jurisdiction of the court upon the merits *or upon any subject inconsistent with the motion under consideration.* If our conclusion as to the effect of the first motion is correct, clearly the subsequent motions to dismiss and the answer upon the merits did not amount to a general appearance. After defendants had done all they could to avoid personal jurisdiction, they were at liberty to present meritorious defenses, and without losing the benefit of the formal motions, so long as they persisted in their protests against personal jurisdiction." (Italics ours.)

Certiorari was denied in this matter; Bacon Bros. v. Grable, 260 U. S. 735; 67 L. Ed. 488.

Appellant's attempt to distinguish the Dahlgren case sticks in the bark. Counsel admit that under that decision an argument addressed to the merits is not a waiver of the special appearance where a defendant confines his request for relief to a prayer that the motion to vacate be granted. They ignore, however, the principle of the decision, which is that a waiver will not be inferred from conduct which is coupled with an insistence upon the special appearance and is not necessarily inconsistent with such adherence to a challenge to the jurisdiction over the person. In the

memorandum submitted by Thomason in opposition to the motion to amend the concluding phrase was substantially the equivalent of the phrase which is quoted in the Dahlgren decision and which is held to show a continued insistence upon the special appearance. This reduces counsel's argument on the Dahlgren case to the point that our objection to the amendment is a distinguishing feature, because we thereby invoked the discretion of the court and that that could not be done without admitting jurisdiction over the person. The Grable decision, *supra,* seems to fully answer this contention; for it was there held that the invoking of the court's discretion to the extent of procuring leave to amend the motion to quash did not concede jurisdiction over the person or waive the special appearance. Yet, such application for leave to amend just as clearly invoked judicial discretion as does an objection to a proceeding which is professedly designed to defeat the pending motion.

Garvey v. Compania, etc., 222 Fed. 732 (Dist. Ct. Tex.), likewise constitutes a complete answer to this contention, for it is there held that the invoking of the processes of the court to the extent of taking depositions in support of the motion to quash does not waive a special appearance. The theory of the decision is that the invoking of the court's process was a proceeding consistent with and designed to further the motion to quash. The language of the court was:

> "The depositions were taken and offered, and the notice to plaintiff of the taking of the depositions so stated, only in support of the motion to

> quash, and for no other purpose, and these depositions had no relation to anything else than the motion to quash.
>
> The defendant company has continually, by its special appearances in the court, insisted upon the illegality of the service had upon it, and it has taken no action which can be regarded as a general appearance in the case."

The language of the Supreme Court in General Investment Company v. Lake Shore Etc. Ry. Co., 260 U. S. 261; 67 L. Ed. 244, at 252, is apposite. The court there held that a stipulation to the effect that certain evidence used in the state court upon a motion to quash should be used upon the same motion in the Federal court did not convert the appearance into a general one. It used this language:

> "In the application whereon the new hearing was granted the company had declared that it was appearing specially for the purpose only of questioning the validity of the service. *That declaration, made at the outset, applied to and qualified every step taken by the company in bringing the question to the hearing and decision.* Joining in the stipulation was merely such a step."

If that language means anything it means, as applied to the situation at bar, that every step taken by Thomason in the furtherance of his motion to quash and procuring a favorable decision thereon was colored by his initial statement, which was reiterated from step to step, that this appearance was for the sole purpose of contesting jurisdiction over his person.

Counsel's attempt to distinguish the General Investment Company case is in line with all of their other attempted distinctions, in this,—that they would have the court brush aside the various authorities cited by appellee because they do not exactly coincide with this case upon the facts; counsel decline to squarely face the principles enunciated in those cases and seek to have the court establish in this instance a fixed arbitrary rule of waiver, notwithstanding the well established rule of the Federal courts that the matter is one of intent.

Counsel say that the intent, even under the Federal authorities, is to be gathered from the acts of the party. Doubtless this is true, but it is likewise true that the acts of the party who is charged with having waived his special appearance must be clear and convincing to the effect that he actually intended to waive the question of jurisdiction over the person, or those acts must in and of themselves be of such an unequivocal nature that on their face they are *necessarily inconsistent with a continued plea to the jurisdiction over the person.* In the absence of controlling authority, this court will treat the question as one of actual intention, under the rule of the Southern Pacific case, *supra;* and, in that connection, it is perfectly clear that there never was any intention on the part of Thomason to waive his plea to the jurisidiction but that on the contrary everything that he did was in furtherance and support of that plea.

Salmon Falls Mfg. Co. v. Midland Etc. Co., 285 Fed. 214, involved the case of an attachment of the property

of a non-resident. The defendant, for the purpose of limiting the recovery to the property attached, appeared specially for that purpose, denying jurisdiction otherwise over it and denying generally the merits of plaintiff's petition. At the opening of the trial the defendant moved the court to limit the scope of the hearing to the value of the property attached. No formal ruling was made upon this request and the trial proceeded to verdict and judgment. Personal judgment was entered against the defendant and the plaintiff sought to uphold it upon the theory that defendant's participation in the trial upon the merits converted his special appearance into a general one. Speaking of the motion made by defendant to limit the trial to the value of the property attached, the court said at page 218:

> "That this was defendant's first opportunity to so move is clear, and it is difficult to see in what words defendant's contention could be more explicitly stated. We have held that the question of general appearance is one of intent, actual or implied, and that *where the whole purpose of the defendant's application to the court is to protect itself from personal jurisdiction, the conduct which will make the motion unavailing and destroy its basis must be clear and unequivocal.* See Dahlgren v. Pierce (C. C. A.) at page 846; Grable v. Killits (C. C. A.), 282 Fed. at page 195. See, also, Citizens Savings & Trust Co. v. Railroad Co., 205 U. S. 46, 59, 27 Sup. Ct. 425, 51 L. Ed. 703. As applied to this case, we see no inconsistency between the rule so stated and the expression in Wabash Western R. R. Co. v. Brow,

164 U. S. at page 278, 17 Sup. Ct. at page 128 (41 L. Ed. 431), to the effect that 'a voluntary appearance * * * sometimes may result from the act of the defendant, even when not in fact intended. * * *

"The denial of personal jurisdiction, and the attempt to limit the scope of the hearing to one *in rem*—that is to say, to a recovery to be satisfied only out of the attached property—involved no inconsistency whatever. The trial of the action, if limited to satisfaction out of the property attached, involved precisely the same defense to the merits as if personal judgment was to be rendered. If the conclusion of the court below is correct, it is not readily perceivable how defendant could at one and the same time have contested jurisdiction over its person and exercised the right to defend the action to the extent of the value of the attached property. If the decision below is right, defendant could deny personal jurisdiction only by surrendering its defense to a recovery to be satisfied only out of the attached property." (Italics ours.)

The last quoted paragraph clearly indicates that the unfairness of the rule contended for by appellant in this case is a cogent reason for rejecting its legal proposition. In the Salmon Falls case the court in effect said that it would be destructive of substantial rights to hold that the special appearance was waived when defendant was placed in a position where he must, under plaintiff's contention, sacrifice other substantial rights in order to maintain his plea to the jurisdiction. So, here, appellant contends that the moving party

must sit still and permit the record of service to be changed without objection on his part and his motion to be thus indirectly defeated.

Pine Hill Coal Co. v. Cusicki, 261 Fed. 974, 977, and Yanuszauckas v. Mallory S. S. Co., 232 Fed. 132, 133, hold in effect that procuring an order extending time to plead does not work a general appearance. In the Yanuszauckas case the court said:

> "To assert that the defendant was compelled to accept a situation which might result in a default being taken against him while the court was considering its rights is both illogical and unfair."

It will be observed that in both of the last cited cases the extension of time to plead was procured in conjunction with and as a part of the special appearance, and therein lies the distinction between these cases and the cases cited on page 114 of appellant's brief. In the Yanuszauckas case the court said:

> "The defendant appeared specially for the sole purpose of moving to dismiss. The statement in the notice of appearance that the defendant appeared 'specially for the purpose of moving to dismiss the summons and complaint' prevents it from being considered as a general appearance."

And in the Pine Hill Coal Company case, 261 Fed. at 977, the court said:

> "The use of the phrase that it appeared specially for the purpose of setting aside the service of the summons, and at the same time, in the order to show cause extending its time to 'appear, demur or answer or otherwise act upon the sum-

> mons and complaint' prevents it from being considered a general appearance. It is only where the plaintiff in error pleads to the merits in the first instance, without insisting upon the illegality that the objection is deemed to be waived."

The recent case of Davenport v. Superior Court, 183 Cal. 506, is in point. In that case the defendants first procured an order extending time to plead and thereafter moved the court to quash service. The California Supreme Court held the order extending time did not work a general appearance, in view of the fact that it was really procured as a preliminary to the motion to quash. The language on page 511 is particularly pertinent. It should also be observed that the defendants in that case "appealed to the discretion of the court" when, as shown on page 509, they moved the court to set aside a default judgment which had been entered against them. Although the effect of this particular move was not expressly discussed in the opinion of the court, the ruling necessarily involved a holding that such application to the court, made in furtherance of the challenge to the jurisdiction over the person, did not work a general appearance.

Examination of appellant's authorities discloses the following situation:

In Everett Ry. etc. Co. v. U. S., 236 Fed. 806, the application for the order extending time to plead was the first appearance. It did not purport to be special and the special appearance was not attempted until a month after the extension of time had been procured.

Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495, discloses that the order extending time to plead was procured in the state court before removal; that in that order there was no reference to any special appearance and the motion to quash was first made after removal to the Federal court. At page 498, the court said:

> "Such an appearance may be either general, that is, without reserve, or it may be special, for a particular purpose; but if intended as special it must be so stated in some appropriate manner, otherwise it will be deemed a general appearance.
>
> "In this instance, as disclosed by the very comprehensive terms of the order, the application was without reserve, the order being sufficiently broad to enable defendant within the time given to plead to the complaint in any form in which under the statute he could be called upon to answer the cause of action set up. Moreover, the application was purely a voluntary one on the part of the defendant. * * *"

Briggs v. Stroud, 58 Fed. 717, was merely a case in which a general appearance had been originally entered by way of obtaining extensions of time to plead, but at the hearing counsel sought to have their appearance taken as special and to be permitted to plead to the jurisdiction, which application was denied.

Brookings State Bank v. Federal Reserve Bank, 291 Fed. 659. In this case a stipulation for an extension of time to plead was made on or about November 23rd and an order of court entered thereon. Thereafter, on December 26th, defendant attempted to make

a special appearance. At page 661 the court said, with respect to the stipulation:

> "Nothing is said from which to infer that defendant designed to reserve its right or privilege of objecting to the jurisdiction of the court over the person of the defendant."

The court also uses this language, which might well be applied to the situation at bar, in view of the highly technical nature of the position taken by appellant:

> "Another question is presented, which pertains to the *power of the court, in its discretion, to relieve the defendant of the effect of its general appearance, and allow it now to appear specially for contesting jurisdiction over the person. While it is obvious that the court is possessed of such power,* it is not at all clear that it should so exercise it in the present case. To permit the defendant to raise the question now would be to permit it to violate a solemn stipulation, in which the opposing party has acquired a valuable right, and this by extending to the defendant a favor asked for and granted. (Italics ours.)

Placek v. American Life Insurance Co., 288 Fed. 987, presents merely a case of a general appearance in the first instance and a belated attempt to thereafter make a special appearance.

The outstanding feature of the above discussed authorities relating to the effect of an order extending time to plead is that they all expressly or impliedly concede that such an application, when coupled with

a notice of special appearance, even though it is an "appeal to the discretion of the court," does not work a general appearance,—thus showing that it is not every appeal to the discretion of the court which works a general appearance; it is only those appeals to the court's discretion which are inconsistent with the special plea. Certainly the authorities do not establish the proposition that any appeal to the discretion of the court which is made for the purpose of furthering or effectuating the special plea works the destruction of the very plea in support of which the application is made. The proposition is illogical and unsound and finds no support in the authorities.

The result of the reversal of Judge James' order would certainly be startling. The court found that Jasper Thomason was never served with subpoena in such manner as to require him to appear in the action; he never did appear; and the default judgment which was entered against him was set aside by the lower court upon the ground that it was void for want of jurisdiction. If the order is reversed the effect will be that Thomason is held to have submitted himself to the jurisdiction of the court after the entry of judgment; that judgment, under appellant's contention and authorities, is now made a valid judgment to the same extent as if Thomason had originally been served with subpoena and had deliberately defaulted. Although he had a perfect right to stay out of court at the time of the trial, he is now, according to appellant's contention, legally convicted of fraud

and conspiracy and other wrongs and this result has been accomplished purely by the fortuitous circumstance that he has made a misstep (if such it be) in urging his point that the court had no jurisdiction over him. By reason of an act which he took in good faith for the purpose of effectuating his plea of lack of jurisdiction over the person, and which was taken only for the purpose of availing himself of that objection, his whole motion is subverted into a general appearance and has defeated itself. The result would not be so harsh had this thing occurred prior to the trial of the action, but coming, as it does, at this stage of the proceeding, it fastens as a valid judgment upon him a decree which convicts him of "grave wrongs," and under circumstances where he has not actually had his day in court or been summoned to come into court and present his defenses.

Wherefore, it is respectfully submitted that the orders from which appeals herein have been taken should be affirmed.

Wm. T. Kendrick,
Gurney E. Newlin,
A. W. Ashburn,

Solicitors for Defendant Jasper Thomason, Appearing Specially Herein for the Purpose of Contesting Jurisdiction Over Person and Not Appearing Generally Herein.

No. 4694.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frances Investment Company, a corporation,

Appellant,

vs.

Jasper Thomason,

Appellee.

REPLY BRIEF FOR APPELLANT.

WM. STORY, JR.,
JOSEPH L. LEWINSON,
LAURENCE W. BEILENSON,
Solicitors for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

PAGE

Introductory Statement 3

Reply to Matter Under Caption "Statement of Facts" 7

1. The record shows that Thomason and his daughter Meryle were charged with and found guilty of grave frauds.................... 7
2. The frauds charged against Thomason, his daughter Meryle, and his son-in-law Davis, were brought home to Thomason in the very proceeding under review on this appeal, and not having been denied in whole or part, destroy the credibility of Thomason and his family affiants 13
3. Further observation on so-called "Statement of Facts" 17

The Return Was Complete and Self-supporting... 21

Cases Where There Was no Territorial Jurisdiction Are Not in Point........................ 24

The Return Being Complete and Self-supporting on Its Face and Jurisdiction Over the Person by the Sovereign Being Conceded, the Return Was Conclusive 25

A Waiver of Limitations Is Necessary........... 32

Defendant Must Show a Meritorious Defense Which He Offers to Interpose................. 32

Due Diligence Must Be Shown.................... 30

The Facts 33

The Court May Review the Facts Afresh......... 34

An Oral Hearing Should Have Been Allowed.... 35

Service on the Married Daughter Was a Compliance With Rule 13........................... 35

There was a General Appearance............... 39

Conclusion 41

TABLE OF CASES.

PAGE

Blythe v. Hinckley, 84 Fed. 228 29
Blythe v. Hinckley, 84 Fed. 228 29
Cowden v. Wild Goose Mining and Trading Co., 199 Fed. 561, 565 31
Davant v. Carlton, 53 Ga. 491 34
Davidson Bros. Marble Co. v. U. S., 213 U. S. 10 .. 30
Del Camp v. Camarillo, 154 Cal. 647, 660 16
Equity Rule 13 (198 Fed. xxii, 115 C. C. A. xxii) . 36
Evans v. Yost, 255 Fed. 726 5
Fitzgerald Const. Co. v. Fitzgerald, 137 U. S. 98 .. 41
Fountain v. Detroit etc. Co., 210 Fed. 982 23
Freeman, Vol. 1, Sec. 228, page 448 26
Freeman, Vol. 3, Sec. 1201, page 2494 27
Freeman, Vol. 3, Sec. 1229, page 2558 27
Freeman on Judgments 25, 26
Gregory v. Ford, 14 Cal. 138 29
Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444. 25
Henderson v. Staniford, 105 Mass. 504 24
Higham v. Iowa, etc. Ass'n., 183 Fed. 845 25
Kirby v. Tallmadge, 160 U. S. 379 15
Locke v. Locke, 18 R. I. 716, 30 Atl. 422 26
Martin v. Gray, 142 U. S. 236 31
Mechanical Appliance Company v. Castleman, 215 U. S. 437 25
Mexican Central R. Co. v. Pinkney, 149 U. S. 194 .. 24
Moore on Facts, Section 574 16
Neitert v. Trentman, 104 Ind. 390, 4 N. E. 306 26
Nickerson v. Warren etc. Co., 223 Fed. 843 29
Pennoyer v. Neff, 95 U. S. 714 24
Peper Automobile Co. v. American Motor Car etc. Co., 180 Fed. 245 25

PAGE
21 R. C. L. 1292 24
Robinson v. Miller, 57 Miss. 237 23
Robinson v. Miller, 57 Miss. 237 34
Shepherd v. Marvel, 16 Ind. App. 417, 45 N. E. 526 26
Simon v. Southern Ry. Co.,. 236 U. S. 115 24
S. P. Co. v. Arlington Heights Fruit Co., 191 Fed. 101 41
Story on Conflict of Laws (8th Ed.) Sec. 540, pp. 754, 755; Sec. 547, p. 761 24
St. Louis etc. Railway Co. v. McBride, 141 U. S. 127 41
Vaule v. Miller, 64 Minn. 485 23
Vaule v. Miller, 64 Minn. 485 34
Wabash Western Railway v. Brow, 164 U. S. 271 41
Ware v. Crockett, 9 Cal. 107 24
Weis v. Parsons, 144 Cal. 410 16

No. 4694.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frances Investment Company, a corporation,
Appellant,
vs.
Jasper Thomason,
Appellee.

REPLY BRIEF FOR APPELLANT.

May It Please the Court:

Introductory Statement.

The positions taken in the brief for appellee were anticipated and dealt with in our opening brief. But, in his brief of 110 pages, appellee has advanced some arguments and cited a number of cases that we could not reasonably have answered in advance. Furthermore, by skilful selection of his materials, appellee has made assertions as statements of fact that are calculated to give the impression the cause in which

the orders appealed from were made, was a formal proceeding to foreclose a mortgage, and for an accounting in which he, the said appellee, was but a nominal party. By reading the returns of the marshal and the supporting affidavit of his deputy according to the most rigid rules for the construction of a common law pleading, and distorting one or two inadvertences and clerical misprisions into evidence of perjury, together with a liberal use of invective, appellee's learned counsel have undertaken to paint the officers of the law as black as Isis. Said counsel have also seen fit to make ridiculous and uncalled for insinuations about the counsel who conducted the trial of the cause for appellant. This use of "atmosphere" is manifestly designed to suggest that the injury done appellant by the order quashing the service of process on appellee after final decree following full hearing, and seven years of litigation, was merely technical in character, and that the orders appealed from are sufficiently supported by the purely formal and perfunctory showing adduced by appellee. This is a perversion of the record.

It is not altogether surprising to find counsel indulging themselves in this manner, as they appear to have found it hard to answer our arguments.

As the case stands, Thomason, the appellee, is beset with difficulties. In the first place, if it should be conceded that the service was on Thomason's daughter Rosamond, as claimed by Thomason, the service was good because at the time thereof Rosamond was an "adult person" within the meaning of Equity Rule

13. (A case expressly in point, which we failed to locate until a day or two ago, is *Evans v. Yost,* 255 Fed. 726, decided by the Circuit Court of Appeals for the Eighth Circuit, and reviewed below.) To hold otherwise would give to the word "adult", used in the rule as an adjective, a meaning other than its generally accepted meaning; would give no meaning at all to the word "person" used in the rule in conjunction with the word "adult", and would ignore the purpose of the rule to provide a practicable method of service. In the second place, Thomason asks a court of equity, after final decree and four years after return of service, to act affirmatively and set aside its decree by quashing service without any showing whatever being made of meritorious defense or diligence, or any offer to come in and defend—and this in studied disregard of the time honored principle that equity will not enforce a mere naked technical right. In the third place, Thomason asks this affirmative action on mere motion, supported solely by the affidavits of himself and members of his family, without the safeguards of a hearing in open court, and further asks to have such affidavits outweigh the return of the marshal with all the presumptions of law and fact in its favor, together with the full and circumstantial affidavit of the deputy marshal, and this is asked although the chief family affidavits were made by Thomason, his daughter Meryle, and his daughter Rosamond. Meryle was charged, both in the cause itself and by affidavits filed in opposition to the motion to quash, with having conspired with

her husband and others to defraud plaintiff of its security by means of a fraudulent registration proceeding, and Thomason was in like manner charged with having conspired with his daughter Meryle, her husband and others, to make away with plaintiff's security, after the fraudulent decree of registration was obtained, together with the conversions and reconversions thereof. Yet in the face of these grave charges both Thomason and Meryle remained silent. Rosamond is involved in self contradictions. She first swore that the writ was delivered to her, and then that it was left on the front porch. Her version of what occurred between herself and the marshal can be true only on the hypothesis that the marshal was either a moron or a willful, reckless and gratuitous falsifier of his official return. In the fourth place, Thomason was within the territorial jurisdiction of the court at the time of service, and the return of the marshal is conclusive evidence under the authorities cited in our opening brief. Counsel for appellee do not cite a single authority dealing with the element of territoriality. In the fifth place, after Thomason had moved to quash the service on special appearance, and said motion had been submitted, he voluntarily filed affidavits and briefs in opposition to our *ex parte* motion to amend the return. This manifestly constituted a general appearance, and not a single one of the cases cited by appellee on the point is to the contrary. Not one of them holds that voluntarily coming in under such circumstances and offering evidence, as well as argument, on the merits of a proceeding not involved in

the motion on which special appearance was made, does not constitute a general appearance.

In view of the special pleading advented to above and inasmuch as the appeals grow out of one aspect of a case in which there were more than a score of defendants and many involved transactions, it will, we believe, lighten the labors of the court, and be in the interest of justice, if we make a short reply to the brief of appellee.

Reply to Matter Under Caption "Statement of Facts."

(Appellee's Brief, pp. 1-17.)

1. *The record shows that Thomason and his daughter Meryle were charged with and found guilty of grave frauds.*

After saying that "the action was brought primarily for the foreclosure of certain mortgages", and that "the amended pleading sought an accounting", counsel for appellee proceed to say:

"The words 'fraud' and 'conspiracy' are frequently used, but the foregoing is the essence of the proceeding." [App. Br., pp. 3-4.]

Counsel for appellee also indulge themselves in the following:

"Counsel, inveighing much against the character and alleged conduct of defendant Thomason and his relatives, seek by the frequent use of such phrases as 'gravest fraud,' 'steeped in fraud,' 'conspiracy,' 'dastardly crimes and frauds,' 'evading service,' and

the like, to divert the attention of this court from the real issues involved in the appeal, and, by indirection, to persuade this august tribunal to join in counsel's passionate disregard of the real facts disclosed by this record." (Id. p. 13.)

Brief reference to the record will show that the assertions quoted above are not justified, and if any one is attempting to "divert the attention of the court from the real issues involved in the appeal" it is the author of those assertions.

The original bill, after alleging that on October 2, 1917, and for a long time prior thereto, and at all times subsequent thereto, plaintiff, a foreign corporation not doing business in California, and with its principal place of business at Salt Lake City, Utah, was the holder of a note for the principal sum of $55,000.00 made by the defendant Austin, and secured by a trust deed on certain land in Imperial County, California, and the pledge of mortgages on certain other land in the same county, charges that Austin and others on the date mentioned "with intent and design to cheat and defraud the plaintiff out of its security" [Tr., p. 27] did cause a land registration proceeding to be brought for the purpose of registering title to the lands in question, free and clear of plaintiff's liens, without service of process on, or notice to plaintiff; and further charges that said registration proceeding was prosecuted to a successful conclusion. The fraud counted on is charged with great particularity. [Tr., pp. 27-79.] It was alleged to have consisted, in substance, of the fol-

lowing: (1) Intentionally omitting plaintiff herein as a party to the registration proceeding. (2) Filing in the court in which the proceeding was pending, a false affidavit of mailing of the petition for registration, and notice of application for registration, to the Delta Land & Water Company, the original holder of the $55,000. note (said affidavit having been made by Meryle T. Davis [Tr. p. 66]), together with a false affidavit of personal service of said petition and notice in the state of Utah, when in truth and fact no such mailing or service had been made, and the Delta Land & Water Company was in ignorance of said proceedings throughout their pendency. (3) Filing on the same day that the petition for registration was filed, and in the same court, an action to quiet title to the three parcels of land involved, in which action both the Delta Land & Water Company and plaintiff were named as parties defendant (plaintiff having been omitted as a party to the registration proceeding); and praying in said suit for registration under the Torrens law, and mailing, and personally serving in Utah, summons and complaint in said action on the Delta Company without procuring an order for substituted service therein (failure to procure such order rendering said mailing and service nugatory). (4) Obtaining the decree of registration without notice to plaintiff.

The amended supplemental bill first reviews the allegations of the original bill. [Tr., pp. 123-133.] Referring to the original defendants, it is alleged:

"That the several facts and circumstances and the fraudulent means and methods of the before mentioned defendants are set forth at length in the original bill of complaint herein, and are hereby referred to and made a part hereof with the same force and effect as if copied herein at this point." [Tr., pp. 131-132.]

It is then alleged:

"*The plan or scheme to defraud* the Delta Land & Water Company and procuring the fraudulent registration of the title to said lands as aforesaid, *was conceived by the defendant H. F. Davis,* and at all times herein mentioned said defendant H. F. Davis acted as the attorney and agent for the defendants Friend J. Austin and Lettie M. Austin, William Martin Belford and Annie Marie Belford, in the furtherance and execution of said plan or scheme.

"*Said defendant Meryle T. Davis is, and at all times herein mentioned, was the wife of defendant H. F. Davis; that said defendant Jasper Thomason is and at all times herein mentioned was the father of said defendant Meryle T. Davis.*" [Tr., p. 133.]

The following allegation is made as to Thomason and certain others:

"*That on or about December 13, 1917, at Los Angeles,* California, *defendants H. F. Davis, Meryle T. Davis,* John W. Austin, Jessie Boyd Bilcher, John Doe *and Jasper Thomason conspired, confederated and agreed between themselves and each other to further said conspiracy,* to conceal said funds and assets and *to assist in the execution thereof.*" [Tr., p. 134.]

It is then alleged that on the following day, which was *the day after the certificate of initial registration was issued, that title to all three parcels of land was conveyed of record to Thomason.* [Tr., p. 134.] The amended supplemental bill then details twenty-seven conveyances of record of the three parcels of land so registered, and the fruits and avails thereof within the next two years, all but two or three of them having been made after the filing of the original bill. As a result of some of these conveyances it is alleged that *Thomason* took title to property in Arizona and Imperial Valley, and acquired a mortgage on one of the parcels originally conveyed to him; that as late as May 5, 1919, this mortgage and the Arizona property were transferred of record to a third person in exchange for ranch property in Imperial County, California, title to which was taken of record in the name of *Meryle T. Davis;* that on May 7, 1918, another of the original parcels registered was exchanged by mesne conveyance for property in Orange County, California, title to which was transferred of record to *Meryle T. Davis;* that on December 11, 1919, both the Imperial County property and the Orange County property were transferred of record by *Meryle T. Davis,* the Orange County property to Messrs. Wilson & Edgar, and the Imperial County property to W. N. Boyer. [Tr., pp. 134-142.]

As to the two pieces of property thus transferred by *Meryle T. Davis,* it is alleged in the amended supplemental bill:

"That in *consideration of the transfers* to them as aforesaid said Francis R. Wilson, A. M. Wilson, Bertha Edgar and W. C. Edgar *paid to defendant H. F. Davis and Meryle T. Davis the sum of Seven thousand five hundred dollars ($7,500) in cash,* which the said defendants converted to their own uses and purposes and have not paid the same or any part thereof to plaintiff.

"That plaintiff is informed and believes and therefore alleges that *the transfer to said defendants Wade N. Boyer* and Leah A. Boyer, as aforesaid, *was without consideration and for the purpose of defrauding plaintiff and the other creditors of said defendants H. F. Davis and Meryle T. Davis."* [Tr., p. 144.]

As to the twenty-seven conveyances before referred to, it is alleged:

"That the *aforesaid* judgments, orders, transfers, certificates, assignments and *conveyances and each of them, were made by the defendants and the other persons herein named and each of them with full knowledge of the rights of the plaintiff* under the aforesaid deed of trust and mortgages, and with full knowledge that said judgment of registration was procured by fraud as aforesaid, and *that all the other acts of defendants, and other persons herein named, and each of them, were taken pursuant to said conspiracies as aforesaid, and for the purpose of cheating and defrauding plaintiff of its security."* [Tr., p. 143.]

In view of the foregoing, we submit that it is utterly absurd for counsel to deny that Thomason and members of his family were charged with grave frauds.

2. *The frauds charged against Thomason, his daughter Meryle, and his son-in-law Davis, were brought home to Thomason in the very proceeding under review on this appeal, and not having been denied in whole or part, destroy the credibility of Thomason and his family affiants.*

In the court below we filed affidavits in opposition to the motion to quash the return, and in said affidavits expressly referred to the allegations of the bill and amended supplemental bill. We also referred to some of the evidence taken at the trial as well as the fact that at the time of the trial Davis had fled to Mexico and Thomason was in hiding in the mountains of Kern County, and Thomason had evaded service of subpoena *ad testificandum*. Likewise, we referred to the fact that after hearing, the court had found that the frauds charged against Thomason, Davis, and Thomason's daughter Meryle, were true. (See our opening brief, pp. 13-14.) (Referring to the quotation on page 6 it should be observed that the expression "bill of complaint" as used in the decree is used to comprehend amended supplemental bill of complaint.) As already pointed out in our opening brief, and herein, neither Thomason nor Meryle T. Davis nor any one else denied any of these charges by affidavit or otherwise, and their counsel frustrated us in our endeavor to have the several family affiants called for cross-examination. What do counsel for appellee have to say to this in their brief?

First, counsel make this statement:

"The cold fact, which a sober examination of this record reveals, is that the district court never acquired any jurisdiction whatever over the defendant Thomason and that any adjudication of fraud or the like which is contained in the judgment and directed to the defendant Thomason is simply *coram non judice*." (App. Br., p. 13.)

Again counsel say:

"For the purpose of the consideration of this appeal, he must be deemed entirely guiltless of any of the alleged wrongs." (Id. p. 13.)

Counsel also say:

"So far as Mrs. Davis is concerned, it appears from the face of the judgment [Tr., p. 228] that any finding of wrongdoing on her part was made in the absence of jurisdiction over her, or of her being represented as a party to the cause. We do not know what the merits of the judgment are with respect to Mr. Davis, but we do know that no man is to be condemned unheard because, perchance, he may have had a rascal for a son-in-law." (Id. p. 15.)

Counsel's final comment is that the evidence of plaintiff that Thomason dodged service of subpoena as a witness is not stated with sufficient particularity, and intimates that it is "speculation" and "pretense". (Id., pp. 13-14.)

The very question in issue on this appeal is whether the decree should have been set aside on the showing

made by the appellee, so we will not discuss the point on the basis of the binding force of the decree. But we submit that the detailed charges made in this very proceeding and in opposition to the motion of Thomason to set aside the return, called for answer, and in the absence thereof, must be taken as true, and as destroying the credibility of Thomason, his daughter Meryle, and the other members of his family.

In *Kirby v. Tallmadge*, 160 U. S. 379, the court said:

> "'All evidence', said Lord Mansfield in *Blatch v. Archer*, 1 Cowp. 63, 65, 'is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.' It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the facts and circumstances attending this somewhat singular transaction, had gone upon the stand, and given their version of the facts. *McDonough v. O'Neil*, 113 Mass., 92; *Com. v. Webster*, 5 Cush. 295, 316. It is said by Mr. Starkie, in his work on Evidence, (volume 1, p. 54: 'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice." (Sup. Ct. Rep. 16, p. 350-351.)

In *Moore on Facts;* Section 574, it is said:

> "When conduct which is apparently suspicious or dishonorable is the subject of investigation, and the actor has an opportunity to explain it, and an interest in doing so, yet fails or refuses, it is but reasonable that the worst construction should be put upon it. The fair inference is that it is incapable of any explanation consistent with honesty and fair dealing. *Lord Stowell said he would indulge no tenderness for the character of a party who shows so little regard for it himself as not to repel an odious charge by every means in his power.*
>
> "In a trademark case where the plaintiff's evidence tended strongly to show that the defendants had adopted a colorable alteration of the plaintiff's trademark with intent to deceive, the court said: 'I would give thought that if the defendants had an honest explanation to give, one of them would have gone into the witness box and offered it. None of them has done so.' "

Our Code of Civil Procedure (section 1963) gives as a presumption:

> "5. That evidence wilfully suppressed would be adverse if produced."

In *Del Camp v. Camarillo,* 154 Cal. 647, 660, it was said:

> "Evidence withheld is presumed to be adverse."

In *Weis v. Parsons,* 144 Cal. 410, the court was called upon to deal with the proof of a negative. In the course of the opinion it was said in part:

"Moreover, the respondent herself endeavored to get before the trial court the want of any reasonable or plausible pretense for the said averments in the complaint in the former action, but appellant frustrated her efforts in that respect, while offering nothing himself on the subject. * * * It appears, therefore, that the respondent proved that said averments were, in fact, false; that she made reasonable efforts to show that appellant had no plausible grounds for said false averments, to which efforts appellants objected; and that appellant, having the ability to show whether or not the averments were wilfully false, simply stood mute. Considering these things, the court was warranted in finding that the false averments were wilfully false."

3. *Further observation on so-called "Statement of Facts."*

There is nothing else in the so-called "Statement of Facts" that merits extended discussion. With the exception of a few scattering points, all the other matters therein are covered in our opening brief or in the discussion of the authorities found below. Let us take up the scattering points summarily.

(a) It is argued that because the marshal struck the words "and Meryle T. Davis" from the return he "did not at that time conclude that he had served Mr. Thomason's married daughter Meryle T. Davis." (App. Br., p. 5.) It is not contended that the marshal knew that the name of Thomason's married daughter, whom he was serving, was Meryle T.

Davis. If he had known it he would, of course, have served her in her own capacity and not stricken her name from the return.

(b) It is insinuated by counsel that Mr. Lewinson falsely stated to the court during the trial that the marshal was in Seattle. (Appellee's Br., pp. 5-6.) It is pointed out in our opening brief that this insinuation is unwarranted. (Appellant's Br., p. 89.) It is also obviously uncalled for, because what Mr. Lewinson may have stated at the trial has precisely nothing to do with the motion to quash. But it is not entirely unexpected. In the court below, in their reply brief on the motion to quash, the same counsel when they apparently assumed there would be no opportunity to meet the insinuation, had the temerity to insinuate that Mr. Lewinson had prepared and filed the amended return himself, without any collaboration with the United States Marshal's office. [Tr., p. 184.] This insinuation is met by the affidavit of Mr. Walton, which was later filed by leave of court. [Tr., 274-279.] Counsel for appellee does not, of course, for a moment believe that Mr. Lewinson made a false statement to Judge Bledsoe, or any one else, and knows that if he had not frustrated the effort of appellant to have the motion to quash heard on oral testimony, all questions he had to put would have been fully and satisfactorily answered, and there would have been no room for innuendo and insinuations. Furthermore, if there be any conflict between the statement of Mr. Lewinson and the affidavit, it would be proper to reconcile it by holding

that the words "several days prior to October 4, 1923" in Walton's affidavit were used by inadvertance, and he meant to say "on or about."

We should not mention the matter at all save that throughout their so-called "Statement of Facts" counsel, by adroit use of language, go to the verge of making a number of other nasty insinuations about both Mr. Lewinson and the marshal that are utterly unwarranted, and will, we believe, meet with the reprobation they merit.

(c) It is claimed that Walton, the officer who served the process, was guilty of perjury because in an official return that he signed as deputy, he stated he had received the writ on May 9 and served the same on May 13, while in his affidavit he stated that three other deputies had attempted to make service prior to the time the writ was placed in his hands, the writ having been issued on May 9. (App. Br., pp. 14-15.) It is obvious that in the return the deputy spoke for the marshal rather than himself, and from the context of the affidavit it is plain that the reference to May 9 as the date when the affiant received the writ is a clerical misprision, because the context shows the service was made the same day affiant received the writ. It is also reasonable to assume that when the first amendment was made, which was after the deputy who made the amendment had gone out of office, the deputy was justified in making the return both in the ordinary way and by way of affidavit. [Tr., p. 217.] This first affidavit of Walton's is in

the very words of the first amended return except that it is verified. In making the first affidavit, therefore, the officer doubtless acted in a purely mechanical way without appreciating that there should be any difference in the content of the paper, and the first amended return.

These trivial lapses on the part of the officer, who offered to pick out in open court the person served, attest his veracity, and are in marked contrast to the eloquent silence of Thomason and his daughter Meryle, the convenient sickness of Thomason himself, and the self contradictions and ridiculous statements of Thomason's daughter Rosamond.

(d) Counsel's parting shot in the so-called "Statement of Facts" is that appellant should not blame Thomason for holding out for technical services, because that is what appellant, itself, did in the registration case. (Appellee's Br., pp. 15-17.) It is not too much to say the comparison is absurd. There was no attempt, whatever, at service in the registration proceeding, either upon plaintiff or its assignor by mesne conveyances, the Delta Land & Water Company. The proceeding in which the fraudulent service was made was the quiet title proceeding, which was used by Davis and his associates to throw plaintiff off its guard, and which never went to judgment, and was dismissed. Furthermore, in the quiet title proceeding it was not a question of technical service at all. There having been no order for publication, the pretended service was absolutely void of *record,* and it not even

being pretended that it had been made upon plaintiff, plaintiff certainly was not called upon to take any steps in the case.

REPLY TO APPELLEE'S POINT I. (pp. 25-51 of Appellee's Brief in Answer to Our Point I A).

The Return Was Complete and Self-supporting.

(Reply to Appellee's Brief, pp. 25-30.)

Appellee contends that we are in error in relying upon the last amended return. The two orders appealed from, the first of which quashed the service, and the second of which refused to set aside the first, were made May 25, 1925, [Tr. 320-322], and July 9, 1925, [Tr. 333], respectively. The order allowing the return to be amended and filed *nunc pro tunc* was made May 22, 1925, [Tr. 318-319]. It will thus be seen that the order quashing service was made after the order allowing the amendment of the return.

The fact that the amended return was not in existence at the time the motion to quash was made is immaterial. The amendment may be made on the hearing of a motion to vacate (*Herman v. Santee,* 103 Cal. 519), and the amendment has a retroactive effect. (*Jones v. Gunn,* 149 Cal. 687; 18 *Ency. of Pleading and Practice,* 963).

So it is the return as finally amended that we must consider.

The return of October 4, 1923, we believe, is also complete and self-supporting, but, however that may

be, it is the final amended return with which we are concerned.

The fact that Judge James might have denied the amendment is beside the point. He granted it, and the order stands unappealed from.

Appellee argues that Judge James found the amended return false before it was filed. There are three answers to this argument. The first is that it is untrue. It must be based on an implied finding by virtue of the order quashing service made May 25. But the order allowing the amendment was made May 22. The second answer is that since the amendment was retroactive, it is effective as of the date of the original service. (*Jones v. Gunn,* 149 Cal 687). The third is that it begs the question. The question under discussion is whether the return is conclusive, that is, whether the court had the right to consider the affidavits to overthrow the return. Therefore, even if Judge James made a finding based on the affidavits that the return was false, which we deny, such finding is beside the point on this question.

The final amended return and Equity Rule 13 are both quoted on page 42 of appellant's opening brief. On comparison it will be seen that the return shows full compliance with the rule, and is therefore complete and self-supporting.

But, says appellee, we must consider the affidavit of the marshal with the return, since it was made in support thereof, and it shows that the marshal did not know the name of the member of Thomason's family that he served.

There are three answers to this argument. (1) The affidavit of the marshal was not filed in support of the final amended return, but in support of the previous returns and the motion to amend them. [See Tr. 268]. Indeed it was filed before the amendment was allowed. [Tr. 279]. (2) The cases of the appellee cited on page 28 of his brief do not support the rule that affidavits will be considered in connection with a complete and self-supporting return, where there is territorial jurisdiction. The only case at all in point, *Fountain v. Detroit etc. Co.*, 210 Fed. 982, holds that an affidavit of the marshal may be used to support an *incomplete* and *defective* return. (See our original brief to the effect that the return stands alone and is conclusive.) (3) Even if the affidavit is considered and does show that the marshal did not know the name of the member of the family served, such fact is immaterial. The return need not name the member of the family to be complete. (*Robinson v. Miller,* 57 Miss. 237; *Vaule v. Miller,* 64 Minn. 485).

In *Robinson v. Miller,* the return showed service by leaving the writ with a member of the family who was not named. The court said at pp. 237 and 238:

> "On this service, a *pro confesso* was entered and a final decree rendered.
>
> "It is now objected that the service is defective, in that it does not give the name of the member of the family to whom the summons was delivered. We do not regard the objection as well taken."

Vaule v. Miller is to the same effect.

Cases Where There Was No Territorial Jurisdiction Are Not in Point.

(Reply to Appellee's Brief, pp. 30-32, pp. 36-37, pp. 42-44)

In our original brief we pointed out that cases involving non-residents not within the jurisdiction were on a different plane than cases involving residents within the jurisdiction. This must be so. The state has complete jurisdiction over the person of all its residents within its borders. It is only a question of bringing them before its tribunals. (*Story on Conflict of Laws* [8th Ed.] Sec. 540, pp. 754, 755; Sec. 547, p. 761; *Henderson v. Staniford,* 105 Mass. 504). On the other hand, the sovereign has no jurisdiction over non-residents not present within the jurisdiction. (*Pennoyer v. Neff,* 95 U. S. 714). Accordingly a personal judgment obtained by publication without personal service on a non-resident not present within the jurisdiction is void (*Pennoyer v. Neff*), but on a resident within the jurisdiction is valid. (21 *R. C. L.* 1292; *Ware v. Crockett,* 9 Cal. 107.)

To prove that there is no distinction appellee cites *Pennoyer v. Neff,* 95 U. S. 714, which holds that a judgment obtained on service by publication on a non-resident not within the state is void, *Mexican Central R. Co. v. Pinkney,* 149 U. S. 194, which was the case of a non-resident corporation not doing business in the state, and *Simon v. Southern Ry. Co.,* 236 U. S. 115, which was the same kind of a case, although the abstract in appellee's brief gives a different impression.

Obviously, these cases do not bear on the question of residents.

When it is a question whether the *sovereign* has acquired jurisdiction over the person, the court may go behind the face of the return. This was the case in *Mechanical Appliance Company v. Castleman,* 215 U. S. 437, in *Peper Automobile Co. v. American Motor Car etc. Co.,* 180 Fed. 245, and in *Higham v. Iowa, etc. Ass'n.,* 183 Fed. 845. When the sovereign has jurisdiction over the person, and it is a question of bringing the person before the court, and there is proof of service by the sworn officer of the court, complete and self-supporting on its face, the return is conclusive proof of the service. (See the many cases in our opening brief, p. 32.)

An additional reason for the distinction is that a non-resident defendant has the right to defend in his own court. It is not alone a question of his day in court, but a question of what court.

The Return Being Complete and Self-supporting on Its Face and Jurisdiction Over the Person by the Sovereign Being Conceded, the Return Was Conclusive.

(Reply to Appellee's Brief, pp. 30-51.)

Only two authorities on this point not considered in the opening brief are cited by appellee; *Harris v. Hardeman,* 14 How. 334, 14 L. Ed. 444, and *Freeman on Judgments.*

Harris v. Hardeman was a suit to quash a forthcoming bond and to set aside the default judgment on which it was based. The return showed substituted service, but *on its face* failed to comply with either the statute or the rule of court. Accordingly, the judgment was found to be void on its face. Obviously this case is not in point because the return was not only not complete on its face, but affirmatively showed want of service.

By quoting parts of sections from *Freeman on Judgments* (5th Ed.), appellee attempts to show that Freeman supports his position, but this is not the case. This will readily appear upon a little consideration.

As to *Freeman, Vol. 1, Sec. 228, page 448* (pp. 35 and 36 of appellee's brief). At the end of the quotation is a note numbered 12. That note has in it the following sentence. *"But a showing of diligence is required."* (Italics ours.) Moreover, in the note will be found such cases as *Neitert v. Trentman,* 104 Ind. 390, 4 N. E. 306, *Shepherd v. Marvel,* 16 Ind. App. 417, 45 N. E. 526, and *Locke v. Locke,* 18 R. I. 716, 30 Atl. 422, all of which, as is pointed out in our opening brief, adopt the modified rule of conclusiveness. Thus appellee demonstrates that Freeman supports the modified rule, instead of the absolute rule of conclusiveness. We are content for the case to be reversed on Point I.B instead of Point I.A. Moreover, in the same sentence after the last word appellee quoted, the author goes on "though some authorities are to the contrary,

unless the return was induced or procured through the fraud of plaintiff."

As to *Freeman, Vol. 3, Sec. 1201, page 2494* (P. 36 of appellee's brief). The quotation shows on its face, and this is especially clear when read with the context and the cases cited, that a court of equity will refuse relief, where by a state *statute* the sheriff's return may be impeached on motion. Of course, we showed in our original brief that by express statute in some states, the sheriff's return may be impeached. Such statutes do not affect the practice of the national courts sitting in equity.

As to *Freeman, Vol. 3, Sec. 1229, page 2558* (pp. 49 and 50 of appellee's brief). Mr. Freeman takes the position that the remedy by an action for a false return against the marshal is not an adequate remedy.

Let us, however, quote from the same section the words which immediately precede appellee's quotation.

> "*The national courts have steadily maintained that relief could not be had in equity by showing that a return of process was false, unless it was procured to be made by the plaintiff with knowledge of its falsity* * * * [Citing *Walker v. Robins,* 14 How. (U. S.) 584, 14 L. Ed. 552] These views have been more recently reaffirmed in the same court, [citing *Knox County v. Harshman,* 133 U. S. 152, 33 L. Ed. 586] except where the determination of that fact rests upon matters independent of the truth of the return, as where service on a foreign corporation was made by serving the Secretary of State as its statutory

> agent but the corporation was not doing business within the state. [Citing *Simon v. Southern R. Co.,* 236 U. S. 115, 59 L. Ed. 492, relied on by appellee, which clearly shows that there is a distinction in the case of non-residents].
>
> "The rule announced by the federal courts has been accepted and enforced in a number of the state courts."

The section then continues with the part quoted by appellee.

It will thus be seen that the Supreme Court of the United States disagrees with Mr. Freeman on this point.

The action against the marshal may not always give an adequate remedy. In most cases it will. We pointed out in our opening brief that the rule of conclusiveness rests on a balancing of interests. Appellee resorts to the argument *ad hominem,* and says he could have no action against the marshal in this case. We see no reason, if the return is false, why he should not have an action on the bond of C. T. Walton, whose deputy W. S. Walton was, since the amendment is retroactive. If Thomason has no action, it is because he chose to resort to trickery and to gamble with the process of the court. If he lost, he should not be heard to complain. Moreover, what is there to show that Thomason has any ground for complaint? He has studiously avoided stating that he did not have full knowledge of the service and that the final decree is not in accordance with the law and the facts.

Referring now to two cases already discussed.

We have reexamined *Blythe v. Hinckley,* 84 Fed. 228, and we find: (a) That the return was not complete and self-supporting on its face. This appears from the statement of facts and from page 241 of the opinion; (b) The court did not set aside the whole decree, but only the decree on the cross-bill, and retained jurisdiction to go on with the case. This is quite clear, since the court decided that the decree on the cross-bill was only interlocutory. Florence Blythe Hinckley was also a party to other parts of the case. The motion was really to reopen the interlocutory decree on the cross-bill. This will clearly appear if the whole statement and opinion are read.

Nickerson v. Warren etc. Co., 223 Fed. 843 (D. C. E. D. Pa.) is cited by appellee and appellant. On examination it will be found to hold that a marshal's return may be impeached when it is not complete and self-supporting, and may not when it is complete and self-supporting. In the words of the court: "This modification implies the converse, that when the return is complete and self-supporting, the old rule still pertains."

Appellee says that some of the federal decisions are based on state law. We are content to apply the California law, which adopts the modified rule of conclusiveness. (See *Gregory v. Ford,* 14 Cal. 138, pp. 75-77 of our opening brief.)

Many of the cases cited by appellant under Point I.A are singularly ignored by appellee. They are directly in point and cannot be distinguished.

REPLY TO APPELLEE'S POINT II. (pp. 51-68 of Appellee's Brief, in Answer to Our Point I.B.)

Due Diligence Must Be Shown.

(Reply to Appellee's Brief, pp. 51-64.)

Appellee contends that appellant has failed to show Thomason's knowledge. The short answer is that the burden is on the party seeking to set aside the decree to establish lack of knowledge. (See *Massachusetts Benefit Life Ass'n. v. Lohmiller,* 74 Fed. 23 and other cases cited under Point I.B in our opening brief). Moreover, we believe the facts set forth on pages 63 and 64 of our opening brief and the additional facts set forth in our "Reply to Appellee's Statement of Facts" herein show clearly that Thomason did have knowledge.

The cases cited by appellee have all been distinguished in our opening brief. He says they show that knowledge is not notice. Of course it is not. Appellee continually assumes the question. We have not a case where the record shows no service. We have a decree based upon a return faultless on its face. That return is proof of service. But there was no service in fact, says appellee. We submit the court should answer: "The record shows there is. We are not interested in going off the record unless you show that you deserve equity. To show this you must prove due diligence, a meritorious defense, and a waiver of limitations." In other words, it is not a question of service or no service, but of evidence of service.

Appellee significantly disregards *Gregory v. Ford,* 14 Cal. 138, and other well reasoned decisions that we cited. He admits that the language of *Massachusetts Benefit Ass'n v. Lohmiller,* 74 Fed. 23 (C. C. A. 7th Cir.) is against him, but attempts to distinguish that case, and *Martin v. Gray,* 142 U. S. 236, as well, on the ground that they were suits in equity to set aside judgments at law. The decision in these cases is not based on any rule peculiar to equitable relief against judgments at law, but on the contrary as stated by the court in the *Lohmiller* case, upon the broad *"principle that equity will not enforce rights upon grounds which are wholly legal or technical."* (See our opening brief, page 74.) This doctrine is as ancient as the maxims that "equity will not do a vain thing" and "equity looks through the form to the substance", and is clearly applicable to the case at bar.

The principle of *Massachusetts etc. Ass'n. v. Lohmiller* was approved by this court in *Cowden v. Wild Goose Mining and Trading Co.,* 199 Fed. 561, 565.

The distinction between *Massachusetts Benefit etc. Ass'n. v. Lohmiller* and *National Metal Co. v. Greene Consolidated Co.,* 11 Ariz. 108, is that in the Arizona case the plaintiff which sought relief in equity against the judgment at law was a non-resident corporation not doing business in the state. Moreover, the complaint showed due diligence and a meritorious defense. If the Arizona case is in conflict with the *Massachusetts Benefit case* (which of course it is not), the *Massachusetts Benefit* case must control, since it was expressly approved by this court.

A Waiver of Limitations Is Necessary.

(Reply to Appellee's Brief, pp. 64-65.)

The only answer that appellee makes to this point is to say in one breath that the statute of limitations has not run, and in the next breath that if it has, it is because counsel for appellant have been stupid. Whether the statute has run in an equity case is always a question. But the court will not require the party holding the decree to gamble. The party seeking relief must waive. The court does not have to determine whether the statute has or has not run. Appellee cites cases in support of both contentions. That is enough to show it is doubtful. In *Massachusetts Benefit Life Ass'n. v. Lohmiller,* 74 Fed. 23 (C. C. A. 7th Cir.) the court said: "There is no suggestion in the bill of any waiver of the limitation, and, unless waiver were imposed by the court as a condition of interference, the right of action would *probably* be barred." (Italics ours.) No answer is made by appellee to this case and to others like it cited in our opening brief.

Defendant Must Show a Meritorious Defense Which He Offers to Interpose.

(Reply to Appellee's Brief, pp. 66-68)

To our argument and authorities on this point, appellee answers: This is the same as saying defendant must agree to make a general appearance if his special appearance is unsuccessful, citing in that behalf the case of the court in *Davidson Bros Marble Co. v. U. S.,* 213 U. S. 10.

The difficulty with the argument is its premise. The rule that defendant must show a meritorious defense does not prevent defendant from appearing specially and effectively raising any proper point. If the return is defective on its face, defendant can appear specially and set aside the decree. But the difficulty here is that defendant must ask the court to go off the record to set aside a final decree, valid proof of service showing on the face of the return. The only possible reason the court should do this is the injustice of denying a man a day in court. If the man does not want his day in court, and if he had it, would not have a meritorious defense, there is no reason to go behind the record.

There is nothing in the *Davidson* case to the contrary. It holds quite properly that a non-resident corporation not doing business in the district cannot be required to agree to enter a general appearance in order to raise the point. This is obviously sound. As was pointed out in opening brief, the defendant in such a case has not only the right to its day in court; it has the right to defend in its own court.

REPLY TO APPELLEE'S POINT III. (pp. 69-80 of Appellee's Brief in Answer to Our Point II.)

The Facts.

(Reply to Appellee's Brief, pp. 69-70, 73-74)

We shall not burden the court with a new discussion of the facts. A few matters deserve attention, however.

(1). As we have already shown, it is not essential that the marshal know the name of the member of the family served. (*Robinson v. Miller,* 57 Miss. 237; *Vaule v. Miller,* 64 Minn. 485.)

(2). The marshal's affidavit [Tr. 274-279] does not state that the woman served was Mrs. Davis. That was our deduction. If he had known it was Mrs. Davis, he would have served her personally as a defendant. Instead he crossed her name out of the subpoena directed to Thomason and herself. His affidavit is quite consistent with that. He says he served a married daughter, and could pick her out. He does not claim to know her name. From what the other two married daughters say, we are confident it was Mrs. Davis.

(3). The law as laid down in *Davant v. Carlton,* 53 Ga. 491, that the "strongest" evidence is necessary to overthrow the return is not answered.

The Court May Review the Facts Afresh.

(Reply to Appellee's Brief, pp. 71-73.)

Appellee cites two cases from the Eighth Circuit which hold that even in cases of written evidence only, the finding of the trial court is presumptively right. They are wrong on principle, for they disregard the reason for the rule, and are not the law in this circuit. *(United States v. Booth-Kelly Lumber Co.,* 203 Fed. 423). In that case this court said at p. 429:

> "The findings in the court below were made upon evidence which had been taken before an examiner, and not in open court, and they

are not attended with presumptions in favor of findings which are made upon conflicting testimony, where the trial judge has the opportunity to observe the demeanor of the witness."

An Oral Hearing Should Have Been Allowed.

(Reply to Appellee's Brief, pp. 75-76.)

We believe the court should not have gone off the face of the return. But certainly if the decree was to be set aside, it should be on the clearest kind of testimony. Family affidavits should not take the place of cross-examination.

Appellee cites six cases in opposition on page 75. They are all cases of foreign corporations appearing before judgment to establish that fact. That is not the case of setting aside a decree.

We do not believe that the requirement of the "strongest" evidence can be met without an oral hearing.

Service on the Married Daughter Was a Compliance With Rule 13.

(Reply to Appellee's Brief, pp. 76-80.)

Appellee contends that even if the married daughter was served, the service is ineffectual because she was not a resident at Thomason's home. She said she was at the time of service, [Tr. 278], and the marshal so returned. Her spontaneous and disinterested statement then was a part of the *res gestae,* and is better than her interested statement now.

REPLY TO APPELLEE'S POINT IV. (pp. 80-85 of Appellee's Brief in Answer to Our Point III.)

Despite appellee's contemptuous attitude toward this point, we have been fortunate in finding, since the filing of appellee's brief, a case in the Circuit Court of Appeals for the Eighth Circuit directly in point, which sustains our position. (*Evans v. Yost*, 255 Fed. 726.) In that case an alternative writ of mandamus issued from the federal district court to the county judge, who evaded service. An order was entered that service could be made by serving the writ on a member of the family of the judge over fifteen years of age. Service was so made, and the marshal returned that service was made on "Ruby Evans, a member of the family of J. S. Evans * * * over the age of 15 years." The statute of Missouri authorized service in this manner on summons, but no provision was made therein for a service of a writ of mandamus. On an attachment for contempt, the county judge raised the point of no proper service. The court held that Equity Rule 13, and not the state statute applied, and that Equity Rule 13 had been complied with. The court said at page 730:

> "As the court found that, owing to the willful acts of the respondents in the mandamus proceedings, by concealing themselves to evade service of process, the court below, for the purpose of preventing a failure of justice, prescribed for a service which is in effect the same as is authorized by the statutes of Missouri. Equity rule 13 (198 Fed. xxii, 115 C. C. A. xxii) authorizes such

> service of subpoenas in equity, even if there is not willful evasion of the service of process. Therefore, even if the state statutes had required a personal service, and none other, it would not be binding on the national courts.
>
> * * * * * * * *
>
> "It is not even claimed that he had no notice of the granting, issuance, and service of the writ in conformity with the order of the court.
>
> "In view of these facts, we are of the opinion that the order of the district court for the service of the writs was authorized by the laws of the United States, and the service was sufficient."

Moreover, there is the additional argument to those made in our opening brief that to adopt appellee's construction would give no effect to the word "person", and it is a familiar rule of statutory construction that every word in a statute must be given effect, if possible.

Furthermore, there is no answer to the argument on this point made in the opening brief. We showed clearly that "adult" meant "matured" when used as an adjective, and that one of its meanings when used as a noun was "a person of full age." In answer appellee quotes a number of definitions of the noun, but none of the adjective, which is the use here.

If it be sophistry to assume that the Supreme Court of the United States uses words with accuracy, or that in construing the rule formulated by that court meaning is to be given to both the adjective "adult" and the noun "person," then we are sophists.

Counsel argues that we admit we are wrong by saying that Rosamond accused the marshal of making a deliberately false return. One smiles. No doubt we are fatuous as counsel says, but not that fatuous. Rosamond, of course, when she made her affidavit was acting under her solicitor's advice. Her solicitor took the position that one of seventeen years of age was not an "adult person." Otherwise, he would not have made the motion. That being so, according to her information, she was accusing the marshal of making a deliberately false return. Moreover, if we are correct on this point, the other points are immaterial. In arguing them, therefore, it is on the assumption, for the purpose of the argument, that we are wrong on this point.

But, says appellee, there is no showing that Rosamond was an "adult person", even within our meaning. The return, he says, must show on its face a full compliance with the rule. So it does. The return, quoted in full on page 10 of our opening brief, states that service was made on an "adult person". It is axiomatic, as will be seen from all the cases cited in both briefs, that the person attacking a complete return must produce evidence to overthrow it. *Harris v. Hardeman* and *Blythe v. Hinckley* were both cases where the return was incomplete on its face. It seems hardly necessary to add that where the rule uses the words "adult person", a return stating that the person served was an "adult person" is complete in itself, whether "adult person" means "matured person" or "person of full age".

Moreover, there is evidence of Rosamond's maturity. She was over seventeen. This would seem enough, (*Evans v. Yost,* 255 Fed. 726). And a child of fourteen has been held a person "of suitable age and discretion." (21 R. C. L. 1281.)

The conversation of Rosamond with the marshal, as detailed by herself and the marshal, in the absence of countervailing evidence, and there is none, is sufficient to show she was a matured person. (In order that we may not again be accused of inconsistency, of course, we must assume for the purpose of this point that the appellee is correct in saying Rosamond was the one served. But we do not so admit except *arguendo.*)

REPLY TO APPELLEE'S POINT V. (pp. 85-110 of Appellees Brief in Answer to Our Point IV.)

There Was a General Appearance.

It would extend this brief to undue lengths to discuss anew the authorities on this point. All the authorities cited by appellee have been distinguished in our opening brief.

Appellee argues that the motion to amend was occasioned by the motion to quash. Again we admit it. But that does not make it the same motion. The fact remains it was a new motion, and appellee appealed to the court's discretion and argued the merits in an attempt to defeat it. The question is not why the motion was made, but what the motion was.

But appellee says he would have been in a bad fix if he had not opposed the motion. A dishonest marshal can always amend, and a good, honest defendant cannot oppose it. The court will not assume its officers will swear falsely. The danger is as great in an original return as in an amendment. And why should the marshal, who had no interest in the matter, falsify his return? Moreover, the amendment was granted, and yet the motion to quash was also granted. Besides the fact of exigency is immaterial, as the cases cited in our original brief show. Suppose while a motion to quash summons was pending, plaintiff applied for an injunction. Perhaps the injunction, if granted, would ruin defendant. Yet if he opposed it, no one would contend that he had not entered a general appearance. In such a case he must make up his mind, whether to be in or out of court, but as is pointed out in *Crawford v. Foster,* 84 Fed. 939 (C. C. A. 7th Cir.), he cannot be both. Furthermore, there was no exigency. If appellee was defeated on his motion to quash by the amendment, he could have made a new motion to quash the amended return.

Appellee did not deign to comment on *Crawford v. Foster,* or on *Wabash Western Railway v. Brow,* 164 U. S. 271, or on *Edgell v. Felder,* 84 Fed. 69 C. C. A. 5th Cir.). Like so many of the cases in our opening brief, they are treated with lofty silence.

The real difference between appellee and appellant is that appellee says a defendant's appearance or non-appearance should be judged by what he says; appellant says it should be judged by what he does.

S. P. Co. v. Arlington Heights Fruit Co., 191 Fed. 101, was decided on the ground that the attacks were all on jurisdiction, and is not an authority here, because here the appeal was to discretion. If the case stands for more, it proves that defendant can appeal to the merits, and still not make a general appearance. If this is the holding of the case (and we do not believe it is), it is not the law because it is in conflict with *Wabash Western Railway v. Brow,* 164 U. S. 271; *St. Louis etc. Railway Co. v. McBride,* 141 U. S. 127, and *Fitzgerald Const. Co. v. Fitzgerald,* 137 U. S. 98.

Conclusion.

In conclusion, we make bold to assert that this case is not without public importance. We submit that if the marshal is required and at his peril to determine whether a person served is of full legal age rather than of sufficient maturity to understand the nature of a writ, or if a decree can be set aside on mere formal affidavits, of the most perfunctory character, coming from polluted sources, then the very integrity of process is in danger.

For the reasons made to appear in this and our opening brief, it is respectfully submitted that the orders appealed from should be reversed with instructions to the court below to make its order denying appellee's motion to quash.

Wm. Story, Jr.,
Joseph L. Lewinson,
Laurence W. Beilenson,
Solicitors for Appellant.